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Date: September 22, 1994

Case No. 1992-CAA-1

In the Matter of

DAVID NOCHUMSON

Complainant

v.

LOS ALAMOS NATIONAL LABORATORY

Respondent

Appearances:

On Behalf of the Complainant

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Before: Paul A. Mapes
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding involves a claim against Los Alamos National Laboratory (hereinafter also referred to as "the Laboratory" or "LANL") under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (hereinafter also referred to as "the Act"). In general, these provisions prohibit employers from firing or otherwise retaliating against employees who have engaged in certain actions in furtherance of the Act's enforcement. The complainant, David Nochumson, is an employee of LANL who alleges that during 1991 the Laboratory took various adverse actions against him in retaliation for having engaged in activities that are within the scope of the Act's protection.

A formal hearing was held in Santa Fe, New Mexico, on June 7, 8, 9, and 10, 1994.[1] At the hearing testimony was received from nine witnesses and the following exhibits were admitted into evidence: Complainant Exhibits (CX) 1-173 and 175-178; Respondent Exhibits (RX) 1-163, 165-196, 198-207, and 209-219. Both parties filed post-hearing briefs.

SUMMARY OF EVIDENCE

A. The Parties

Los Alamos National Laboratory, which is located approximately 60 miles northeast of Albuquerque, New Mexico, is owned by the United States Department of Energy and operated by the University of California. CX 141 at 3. The Laboratory has been the site of advanced nuclear weapons and energy research since 1943 and covers an area of approximately 43 square miles. Id., RX 199 at 1-7. About 11,000 people either live or work on the facility. RX 199 at 1-7.

The complainant (hereinafter also referred to as "Nochumson") was born on January 27, 1948. He holds a bachelor's degree in chemical engineering from Rutgers University as well as M.A. and Ph.D. degrees in environmental engineering from Harvard University.[2] Tr. at 96. Except for a sabbatical he took in 1989 and a period of disability during parts of 1991 and 1992, Nochumson has worked as a Laboratory staff member continuously since 1978. Id. During the time periods that are relevant to this case, he worked in LANL's Health Safety and Environment Group 1 (hereinafter "HSE-1"), a unit which was assigned responsibility for protecting lab employees and the public from the potentially harmful forms of radiation that are generated by the various activities being conducted at LANL. While employed in HSE-1, Nochumson's work primarily related to the Laboratory's Radioactive Air Emissions Monitoring (hereinafter "RAEM") program. Tr. at 189. During most of the period that Nochumson did this work his immediate supervisor was Larry Andrews, a section leader in HSE-1. Andrews' supervisor was Joe Graf, the HSE-1 Group Leader, who in turn reported to Ron Stafford, HSE's Deputy Division Leader for Radiation Protection.

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[1] Although the request for a hearing in this case was made in October of 1991, the hearing was delayed until 1994 due to several factors, including the death of the complainant's wife, various discovery disputes, and prolonged settlement discussions.

[2] It is noted in this regard that like the complainant, almost all of the LANL employees involved in this case have received doctorate degrees in some type of scientific discipline. In order to avoid unnecessary repetition, the title "doctor" will not be used in this decision when referring to any Laboratory employees, including the complainant.

Stafford's supervisor was John Puckett, the HSE Division Leader, who reported to Allen Tiedman, the Laboratory's Associate Director for Operations. Tiedman, in turn, reported to James F. Jackson, LANL's Deputy Director, and Siegfried Hecker, the Laboratory's Director. See RX 187 at 3-7.

B. Summary of Events Relevant to Nochumson's Employment

On December 15, 1989, the Environmental Protection Agency (hereinafter "EPA") promulgated at Subpart H of Part 61 of Title 40 of the Code of Federal Regulations a set of Clean Air Act regulations entitled the "National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities" (hereinafter "Subpart H"). 54 Fed. Reg. 51654-715 (Dec. 15, 1989), 40 C.F.R. §§61.90-97. These regulations, inter alia, prohibit Department of Energy (hereinafter also referred to as "DOE") facilities from discharging radionuclides into the ambient air if the quantity of radionuclides discharged would cause any member of the public to receive from such a facility over the course of a year an effective dose of radiation of more than 10 millirems.[3] 40 C.F.R. §61.92. Radionuclides are defined in the regulations as any type of atom that spontaneously undergoes radioactive decay. 40 C.F.R. §61.91(c). In addition to adopting the 10 millirem exposure standard, the regulations also set forth very detailed requirements for monitoring radionuclide emissions from DOE facilities, including a requirement for the continuous monitoring of all stacks or vents (hereinafter collectively referred to as "stacks") from which a certain quantity of radionuclides could potentially be emitted.[4] 40 C.F.R. §61.93. See also CX 42, CX 127 at 2141 et seq.. All of the requirements of these regulations went into effect on March 15, 1990.

The evidence indicates that at the time Subpart H went into effect in 1990, the volume of radionuclides being emitted from the Laboratory was only slightly above the 10 millirem standard, based on the measurements of the Laboratory's pre-existing system of air monitoring, i.e., its pre-existing stack monitors and its pre-

[3] According to the EPA, 10 millirems is approximately equivalent to the amount of radiation that a person would receive from an ordinary chest x-ray. RX 209. In comparison, other evidence in the record indicates that Los Alamos area residents receive approximately 330 millirems of exposure per year from natural sources. Tr. at 68. Testimony also indicates that a passenger on an commercial airline flight between Los Alamos and Washington, D.C., would typically be exposed to approximately five millirems of radiation. Tr. at 91.

[4] According to Nochumson, these stack monitoring requirements were essentially the same as the air monitoring requirements previously adopted internally by the DOE. Tr. at 103-04.

existing network of devices that measured the volume of radionuclides in the ambient air surrounding the Laboratory.[5] However, it is clear from the record that the Laboratory's pre-existing system of stack monitoring did not fully correspond with all of the requirements in Subpart H and that therefore the Laboratory was not in compliance with that aspect of the regulations.[6] In particular, it appears that of the more than 100 stacks at the Laboratory some had no monitoring systems at all and others had monitoring systems that did not fully comply with all of the requirements of the regulation. See CX 121 at 2146, CX 141, CX 13 at 448-75, CX 17, CX 21, CX 18, CX 45. An EPA publication indicates that although the EPA cannot bring an enforcement action against the DOE or any other federal agency for a violation of this nature, it does have full authority to bring enforcement actions against contractors who operate DOE facilities, such as the University of California. RX 210 at VI-1. As well, the EPA notes that it has authority to seek sanctions for criminal violations by employees of such contractors or by employees of a federal agency. Id.

Because of the promulgation of the Subpart H regulations, in February of 1990 Larry Andrews (hereinafter "Andrews") informed his supervisor, Joe Graf (hereinafter "Graf") that HSE-1 would need to hire an "Air Analyst Health Physicist" to do work related to the Laboratory's compliance with those regulations. CX 166. Sometime thereafter Nochumson responded to a notice announcing the vacancy and in April of 1990 was transferred into the job from another position in the Laboratory's Health, Safety and Environment Division. Tr. at 100-01. Although Nochumson had a variety of responsibilities in this new job, including devising a plan for bringing the Laboratory into compliance with Subpart H, he did not have any subordinate staff members or any discretionary funds.[7] Tr. at 189, 201-08. Moreover, because air emissions monitoring

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[5] In a 1992 "Fact Sheet" the EPA determined that the Laboratory's total emissions for 1990 were at 11.5 millirems and therefore in excess of those permitted under Subpart H. RX 209. However, the same "Fact Sheet" also concluded that the emissions during the following year (1991) totalled only 4 millirems and were therefore within the requirements of Subpart H. Id.

[6] A later inventory of LANL's stacks and vents indicated that there are over 100 stacks at the facility that emit radionuclides. CX 141. Of these, two stacks at the Laboratory's Meson Physics Facility accounted for 95 percent of the Laboratory's radioactive air emissions in 1990. Id.

[7] Another important job responsibility was preparing monthly and quarterly reports concerning the Laboratory's radioactive air emissions. Tr. at 776. A more detailed list of Nochumson's responsibilities is set forth in RX 39.

responsibilities at the Laboratory were widely diversified, his ability to successfully perform his job depended heavily on the cooperation of employees in numerous other parts of the Laboratory. Tr. at 703-04. In a memorandum that Nochumson wrote shortly after transferring to his new position, he listed his job title as "Project Leader, Radiological Air Effluent Sampling System," but apparently he was more commonly referred to as the "RAEM manager." CX 20, Tr. at 189.

Within a few months after Nochumson began working on the RAEM program, the DOE requested a report on the status of the Laboratory's compliance with the requirements of Subpart H. CX 23. In a July 17, 1990 written response to the DOE's Albuquerque office, John Puckett, the HSE Division Leader, represented that the Laboratory's radioactive air emissions were within the 10 millirem limit, but that there were "many cases" in which it was not possible to comply with the stack monitoring requirements without making "major modifications" to existing exhaust systems. Id. The written response also indicated that the Laboratory planned to request funding to make the necessary modifications and that the effort would cost an estimated $10 million and take six years to complete. Id.

On August 30, 1990, Nochumson formally submitted for supervisory review a 13-page document entitled "Corrective Action Plan--Radiological Air Effluent Monitoring Program at the Los Alamos National Laboratory" (hereinafter referred to as the "Corrective Action Plan" or "the Plan"). CX 26. The Plan noted that the EPA and DOE requirements concerning the monitoring of radioactive effluents "are only being partially met because of the lack of available funding and staffing" and set forth eight specific steps that would have to be taken to bring the Laboratory's RAEM program into compliance with the requirements of Subpart H. Id. It was also projected that full compliance would not be achieved until 1998 and specifically stated that in order to achieve this goal qualified staffing and funding would be "essential." Id. at 13. In this regard, the plan suggested that three additional staff members and two additional technicians would be needed. Id. The Plan was thereafter reviewed and approved by various supervisors in the HSE Division, including Deputy Division Leader Ron Stafford. Id.

In the months following the preparation of the Corrective Action Plan, Nochumson began to focus his attention on implementing the Plan. However, various documents prepared by Nochumson during this time period indicate that these efforts were frustrated by what Nochumson perceived to be a lack of funding and a lack of cooperation from some of the other organizational units at the Laboratory that had responsibility for various aspects of air emissions monitoring. See, e.g., RX 22, RX 57, RX 118, RX 145, CX 19, CX 28, CX 29, CX 34, CX 35. Thus, in what appears to have been an effort to convince his superiors to push for greater funding and

cooperation, Nochumson began including statements in his written reports which emphasized the fact that the Laboratory's existing RAEM program was not in compliance with the EPA regulations. For example, in the minutes of an October 2, 1990 meeting Nochumson wrote that the lack of sufficient funding for implementing the Corrective Action Plan "puts the Lab at risk concerning noncompliance penalties and the associated public perception." CX 34 at 648. Likewise, in the first paragraph of an October 10, 1990 quarterly report to Andrews Nochumson stated that the Laboratory's RAEM program "has major deficiencies and is not in compliance with Federal laws and regulations." CX 35. He added that because of these deficiencies, "the quality and defensibility of the [radioactive emissions] measurement data are in question." Id.

Nochumson's efforts to gain funding for Subpart H compliance, however, were not totally unproductive and he was apparently given assurances that Radian Corporation, a contractor that was doing a survey of non-radioactive air emissions for another group in HSE, would also be asked to expand its survey to identify sources of radioactive air effluents. CX 46. Likewise, $500,000 was set aside for other work related to the implementation of the Corrective Action Plan. RX 72, RX 187 at 13, RX 192, Tr. at 128.

In December of 1990, Nochumson's complaints about a lack of adequate funding and a lack of coordination of compliance efforts were echoed in a draft of an internal audit of the Laboratory's environmental compliance programs. In particular, the report noted that the Laboratory's monitoring of radioactive air pollutants did not comply with federal regulations and that there was no "integrated and formal air quality management program" at the Laboratory. CX 45 at 722, 750-52. The report also noted that the groups in HSE that were aware of the regulatory requirements were "not adequately staffed or funded." Id. at 752.

Despite the fact that Nochumson and others were pointing out that the Laboratory needed to allocate more resources to achieving compliance with Subpart H, in the Fall of 1990 the Laboratory's Fiscal Year 1991 budget for environmental compliance was actually cut by 14 percent rather than increased. RX 14. An internal memorandum describing this reduction specifically indicated that the budget reduction could result in "probable fines" for violating the provisions of Subpart H. RX 14 at 17th unnumbered page. In a memo dated January 30, 1991, Andrews estimated that the "budgetary shortfall" caused his section of HSE to be 29 people "short" of the estimated number of people needed to fulfill the section's responsibilities. RX 68. These budgetary shortfalls were apparently the result of decisions by the DOE not to fully fund various environmental compliance proposals, including the Laboratory's proposal for funding improvements in its RAEM program. See, e.g., RX 190, CX 133 at 2215.

Laboratory documents indicate that at approximately this same time the Department of Energy was participating in discussions with the EPA concerning a possible Memorandum of Understanding ("MOU") that would extend the deadline for compliance with Subpart H for two years for all DOE-owned facilities. See RX 52, RX 53, RX 152. In a January 15, 1991 response to a request for comments on such a MOU, John Puckett, the Leader of the HSE Division, estimated that compliance with the stack monitoring requirement would cost the Laboratory $12 million and suggested that the MOU be amended to allow alternatives to stack monitoring such as "environmental measurements," i.e., ambient air monitoring. Id. See also RX 147, CX 51.

As full funding for the Corrective Action Program began to appear less and less likely, Nochumson's complaints concerning the lack of funding became increasingly more frequent and outspoken. For example, in a December 21, 1990 revision to the Plan, Nochumson described the Laboratory's RAEM program as having "major deficiencies" that put the "quality and defensibility of the measurement data" in question. CX 52 at 1634. He added that the "low priority" given to the RAEM program had "caused inadequate staffing and funding." Id. The document also attributed the program's "low priority" to a lack of recognition of the problems with the program and with a "lack of external scrutiny and enforcement." Id. at 1634-35. Likewise, on February 5, 1991, Nochumson directed Mark Miller, a contractor who was doing work on a monthly report concerning air emissions, to add a footnote to the report which stated that "because of staffing limitations," the data in the report "may not be completely representative of radiological air effluent emissions" at the Laboratory. CX 57, Tr. at 140. The proposed footnote also listed five specific deficiencies Nochumson had identified in the existing RAEM program and concluded that the program "is not in compliance with US Environmental Protection Agency and US Department of Energy requirements." Id. The footnote concluded by observing that near-term funding would be insufficient to upgrade the program and alleging that such "lack of adequate funding appears to reflect the priority given to this program." Id.

Such comments about the deficiencies in the Laboratory's RAEM program in turn generated conflicts between Nochumson and his immediate supervisor, Andrews. For instance, on February 6, 1991, Andrews gave Nochumson a hand-written note which criticized Nochumson's comparison of the Laboratory's radioactive air emissions monitoring practices with those described in a scientific paper about an incident in which excessive radioactive air emissions were discharged from a nuclear facility in Europe. RX 47. In concluding the note, Andrews wrote that Nochumson should have reviewed the paper more carefully before making the comparison to the Laboratory's RAEM system and added "[i]f you want to follow up on anomalies that might show up in out [sic] program, then great, but don't say our sampling is no good without evidence."

Id. Similarly, on February 13 Nochumson received from Andrews an edited version of the proposed footnote that Nochumson had sent to Mark Miller on February 5. CX 58. Among other things, Andrews had deleted from the footnote Nochumson's language concerning staffing limitations, lack of adequate funding, and the priority given to the program by the Laboratory's management. Id. However, Andrews did not delete the language which stated that the RAEM program was not in compliance with EPA and DOE requirements. Id. According to Nochumson, before giving him the edited footnote Andrews told him that he was opposed to having any footnote at all. Tr. at 140.

According to Nochumson, on February 15 he had a discussion with Andrews in which he contended that the deficiencies in the Laboratory's RAEM program were so extensive that the Laboratory could not demonstrate that its emissions were within the 10 millirem standard and that the deficiencies therefore presented a safety problem. CX 90 at 1866. In response, Andrews asserted that there was no safety problem and expressed concern that such statements could be picked up by the press.[8] Id., Tr. at 178-79, 799-800. Nochumson has also contended that at about this the same time Andrews "threatened" to remove him from the RAEM program. Id., Tr. at 169-70. Andrews acknowledges that he may have made references to abolishing Nochumson's job on this and possibly one other occasion, but contends that he was merely trying to tell Nochumson that he had the option of transferring to some other type of project at the Laboratory if he was unhappy with the nature of his work on the RAEM program. Tr. at 788-90.

The conflict between Nochumson and Andrews intensified on February 21, 1991, when Nochumson began to suspect that Andrews had misled him about the action being taken on Nochumson's recommendation that a non-compliance notification be made to the EPA as soon as possible. CX 90 at 1867. According to Nochumson, on February 21 Andrews told him that the leader of another section, Tom Buhl (hereinafter "Buhl"), was already in the process of preparing such a notification. Id. However, Nochumson testified, later that day he happened upon a meeting between Andrews and Buhl and was told by Buhl that he was not in fact preparing such a notice of non-compliance. Tr. at 133-34. Nochumson's testimony concerning Buhl's statements at the February 21 meeting is disputed

[8] The record indicates that a few days after this conversation the Santa Fe New Mexican began running a series of articles that were highly critical of safety practices at the Laboratory. CX 145. In a subsequent letter, the Director of the Laboratory described the series as having a "seriously negative impact" on the Laboratory, its employees and the Los Alamos community. CX 66. According to Nochumson, some time after this series was published Graf and Stafford made statements suggesting that they suspected that Nochumson may have spoken to the press about his concerns with the RAEM program. Tr. at 178-79.

by Andrews, who testified that Buhl did not make such a statement and that in fact Buhl had been working on such a notification even before the February 21 meeting with Nochumson.[9] Tr. at 784-88.

In any event, during the evening of that same day Buhl called Nochumson at home and asked him to prepare "some input" for a notification to EPA. Tr. at 134. Accordingly, Nochumson drafted a three-page memorandum to Buhl which contained recommended language for the EPA notification. CX 64. The language that Nochumson recommended contained a long list of what were characterized as "major deficiencies" in the Laboratory's RAEM program and concluded that as a result of these deficiencies the Laboratory's RAEM program was not in compliance with Subpart H. The recommended language also asserted that the deficiencies were so extensive that they produced "large uncertainties" concerning the accuracy of the Laboratory's emissions data and that consequently the Laboratory could "not reasonably demonstrate that it is in compliance with the [10 millirem] health standard" set forth in Subpart H. Id. It was also stated in the recommended language that the Laboratory would like to enter into a Federal Facilities Compliance Agreement (hereinafter "FFCA") with the EPA in order to establish a schedule for bringing its RAEM program into compliance with Subpart H. According to Nochumson, while he was working on this memo Andrews came to his office and told him that the problems with the RAEM program were not as severe as Nochumson thought and that the Laboratory did not need to make a non-compliance notification. CX 90 at 1867. Nochumson also alleges that on this same occasion Andrews told him that "management" had decided not to provide the resources necessary for compliance. Tr. at 134.

On February 25 Nochumson sent his memo concerning the non-compliance notification to Buhl and provided copies to his superiors, including Andrews, Graf, Stafford, and Puckett. On the same day Graf and Andrews met with Nochumson and were highly critical of the memo. CX 90 at 1867, Tr. at 142-44. However, Nochumson alleges, Graf and Andrews were unable to rationally substantiate their criticisms. CX 90 at 1867-68, Tr. at 143. In contrast, in an entry in his work diary dated February 26, 1991,

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[9] The contemporaneous description of this meeting that Nochumson wrote in his work diary fails to expressly indicate whether or not Buhl had made any statement about working on an EPA notification. Rather, the entry merely states that Buhl had said that he had been preparing a report for DOE's Los Alamos office. RX 151 at 28. Nochumson's diary entry does indicate, however, that at the meeting Nochumson told Buhl and Andrews that the Laboratory should notify the EPA concerning its non-compliance with Subpart H, thereby suggesting that at least Nochumson believed that Buhl did not intend notify EPA. Id. See also Tr. at 134, 256-65 (Nochumson testimony), RX 187 at 19 (Nochumson's chronology of key events).

Graf wrote that although he had "encouraged" Nochumson "to evaluate the Laboratory's radioactive stack emissions monitoring program fairly and honestly" Nochumson "seems bent on destroying before improving it." RX 24. Graf also noted that he had suggested that Nochumson conduct "a simple experiment" concerning an alleged problem with some of the Laboratory's stacks but that Nochumson "rejected the idea by bringing up all kinds of complicating factors." Id. Graf also wrote, "[i]t makes progress difficult when the person assigned to work a problem won't do the simple cost effective things while holding out for a very expensive research grade program and wants to notify EPA of program deficiencies so as to ensure funding for his research." Id.

According to various statements in the record, at some point during February or March of 1991 Nochumson disclosed to Andrews and Graf that he had consulted an unidentified friend at the EPA about the Laboratory's non-compliance with Subpart H and had been told that the Laboratory should seek to enter into a FFCA with the EPA. Tr. at 130 (Nochumson testimony), Tr. at 792 (Andrews testimony), RX 187 at 15. The evidence also shows that the friend at EPA was David Shapiro, a graduate school classmate of Nochumson's, who is now the Deputy Assistant Administrator of the EPA's Office of Air and Radiation. Tr. at 126-31, CX 176. In a deposition, Shapiro confirmed that Nochumson had contacted him at least "a dozen" times about the Laboratory's non-compliance with Subpart H and expressed concerns about his personal liability for the violations. Id. According to Shapiro, on a number of occasions Nochumson also complained of being harassed. Id. According to Nochumson, Shapiro told him that individuals could be criminally prosecuted if they were involved in submitting false air emissions reports to the EPA. Tr. at 367-68. As a result of this, Nochumson testified, he felt personally vulnerable. Tr. at 371.

On March 15, 1991, Nochumson sent a memorandum to two co-workers (Mark Miller and Rick Brake) concerning the 1990 annual and monthly statistical reports of radioactive airborne effluents. CX 67. In the memo, which was also sent to Andrews and Graf, Nochumson directed that the following footnote be added to each monthly report:

> Based upon an assessment in progress, LANL's radiological air effluent monitoring program is not in compliance with US Environmental Protection Agency and US Department of Energy requirements.... Because of the noncompliance problems that have been identified, the data in this report is not completely representative of radiological air effluent emissions at LANL.

Four days later Graf sent Nochumson a hand-written memo containing

eight numbered paragraphs.[10] CX 68. In the memo Graf asserted that in the recent past the Laboratory had been "proud" of its RAEM program and that in 1987 the DOE had reviewed the program and concluded that the Laboratory was doing "a good job." Id. He then characterized the promulgation of Subpart H as "a cause for further study" but not as "cause for shame and public declarations of guilt." The memo further noted that the Laboratory had notified the DOE that the Laboratory was "probably" not in compliance and was also "preparing" to notify EPA. Graf then asserted that "it is just as misleading to characterize everything in the 'worst possible light' as it is to 'hide' something," and stated, "I prefer to simply state the facts and not editorializing at every opportunity about 'how bad things are'." In the concluding paragraph Graf wrote "Bottom Line: the forms I sign will have positive factual statements, if anything. Would you like to discuss this or do you want me to write them myself?" Below this were two hand-drawn boxes. By one Graf wrote, "discuss," and by the other he wrote, "you're on your own." Id.

On March 20, Nochumson apparently chose to disregard Graf's advice and sent the recipients of his March 15 memo (Mark Miller and Rick Brake) another memo which explicitly stated "[f]ollow the instructions in my draft memo of March 15, 1991." CX 69. In turn, a memo that Miller sent to Nochumson and others on the following day indicates that Andrews overruled Nochumson's directive and told Miller to exclude the footnote from the monthly reports. RX 7.

During this same week, Allen Tiedman, the Laboratory's Associate Director for Operations, sent the DOE's Area Manager for the Los Alamos area a draft letter to be sent to the EPA about the Laboratory's non-compliance with the requirements of Subpart H. CX 70. The draft letter represented that the Laboratory was conducting a survey of its stacks to determine which required monitoring under Subpart H and stated that the Laboratory's preliminary evaluation indicated that the existing monitoring systems "will need to be upgraded." Id. The draft letter also noted that funding was being requested to bring the stacks into compliance as soon as feasible, but that "resources may not be immediately available." Id. For these reasons, the letter concluded, the Laboratory would like to explore the possibility of the DOE and the EPA entering into a FFCA. Id. The letter, however, did not contain any language reflecting Nochumson's view that the Laboratory's RAEM had "major deficiencies" which produced

[10] Graf testified that this memo was not sent in response to any particular action of Nochumson's. Tr. at 717. However, Nochumson asserts that Graf told him on April 4, 1991, that the memo had been prompted by Nochumson's March 15 memo to Mark Miller and Rick Brake. RX 187 at 30, 33. As well, Nochumson testified that when he found Graf's memo in his office mail box, it was attached to a copy of the March 15 memo. Tr. at 148.

"large uncertainties" concerning the accuracy of the Laboratory's emissions data.[11]

The record also shows that during February and March of 1991 Nochumson began to suspect that he might be under surveillance by agents of the Laboratory. In particular, he suspected that his home telephone might be tapped and that somebody might be intercepting his mail. Tr. at 401-23. As well, on several different occasions he feared that various other Laboratory employees, including at least one long-time friend, might be following him. Id. He also suspected that someone may have tampered with documents he had prepared on his office word processor and even became concerned about his personal safety. Id..

Although Nochumson never did check either of the two boxes that Graf had drawn at the bottom of his March 19 memo, on April 4 Nochumson did meet with Graf to discuss the memo.[12] CX 48 at 115-19, Tr. at 697, 699-705. At the meeting Nochumson apparently told Graf that he thought the memo was "inappropriate, unprofessional [and] unreasonable." Tr. at 146-47. As well, during the course of the meeting Graf drew a smiling face and a frowning face on a blackboard and wrote descriptions of Nochumson's conduct next to each of the faces. According to Nochumson's notes of the meeting, next to the frowning face Graf wrote: "Dave has proposed to write to EPA describing our monitoring program as having major deficiencies and because of these deficiencies ... the data is not representative nor accurate." CX 48 at 115-19, RX 187 at 33. Graf has not disputed the accuracy of these notes. See Tr. at 700-02.

During the remainder of the month of April Nochumson came into further conflict with his supervisors over a series of four memos that he wrote concerning the Laboratory's RAEM program.

The first memo was dated April 4 and was sent from Nochumson to Jim Nesmith, another Laboratory employee. RX 99. In the memo Nochumson asked Nesmith to let him know when a contract with Southern Research Institute (hereinafter "SRI") for certain work connected with the RAEM program would be approved and pointed out to Nesmith that the contract was supposed to have been approved the previous month. The memo also stated that the Laboratory was not in compliance with the requirements of Subpart H and asserted that approval of the SRI contract would be "vital in order for LANL to

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[11] At approximately the same time, the Laboratory also responded to a specific request from DOE concerning the status of its compliance with Subpart H. RX 53.

[12] At the hearing, this meeting was described by the respondent's counsel as having occurred on March 18, 1991. Tr. at 700. However, it is clear from the documentary exhibits that this meeting actually occurred on April 4, 1991. See RX 151 at 115-19.

make substantive progress to come into compliance and .... in order to demonstrate that LANL is making a 'good faith' effort" in this matter. In addition, the memo described the Laboratory's lack of compliance with Subpart H as a matter of "public concern." Id.

In the second memo, which was also dated April 4, Nochumson complained to Craig Eberhart (hereinafter "Eberhart"), a section leader in another part of the HSE Division, that Eberhart had reneged on his agreement to have Radian Corporation perform a survey of the Laboratory's various sources of radioactive air emissions at the same time that it performed a Laboratory-wide survey of non-radioactive emissions. CX 155. Like the memo to Jim Nesmith, this memo contained a statement about the Laboratory's lack of compliance with Subpart H, the resulting "public concern," and the Laboratory's need to show EPA that it was making a good faith effort toward coming into compliance. In concluding the memo, Nochumson wrote "I hope that you will honor the original agreement to have Radian Corporation provide all of the information, as previously requested and agreed upon." Id.

According to Nochumson, a short while after he sent out these two memos he received copies of them back with various critical comments from Graf and other managers, including Stafford and Robbie Robertson. Tr. at 150-55. The comment from Graf said, "Larry, Ross and I have caught some of your memos before they could get out. HOWEVER, if you don't let us review them and they go out w/o our review to a broad distribution as this one did, then we can't protect you." CX 175. The note from Stafford said, "[t]he tone of these memos is unacceptable. We're professionals. I hope you agree. We probably need to talk so I can better understand." CX 175, Tr. at 154. Likewise, on April 20, Puckett, the HSE Division Leader, sent a memo to "Tom and Ron" telling them to "co-chair" a meeting of Graf, Eberhart, Tom Hargis (a supervisor in HSE-8), and Nochumson to put "the issues on the table" and resolve the "memo war."[13] RX 43.

The third April 1991 memo that generated conflict was a "January-March 1991 Quarterly Report" that Nochumson sent to "Distribution" on April 25, 1991. CX 77. In the memo he asserted that he had recommended that a "good faith" effort be made to comply with Subpart H and that EPA be notified of the Laboratory's non-compliance "as soon as possible." Besides listing 22 memos, letters, and reports that in Nochumson's opinion documented the non-compliance, the memo also contained a reference to Eberhart's

[13] At about this same time Nochumson had a meeting with Graf in which Graf said that responsibility for the RAEM program might be transferred to HSE-8. RX 151 at 149, Tr. at 648-49. Nochumson then asked Graf if he should start looking into working on another project and Graf said that he would like to have Nochumson continue with his work on the RAEM program. Id.

alleged failure to honor his agreement to have the Radian Corporation perform a survey of radioactive air emissions sources. It was also asserted in the memo that a September 1990 request for $15 million in funding for RAEM compliance efforts had been disapproved and that a promise of $500,000 in funding for the program was later reduced to $233,000. Id. In Nochumson's original draft of this memo 23 other Laboratory employees were included on the distribution list. RX 83. However, when the memo was distributed, only two names were on the distribution list: Andrews and Graf. CX 77. When Nochumson received his copy of the final memo, he wrote a note on it which said, "why were most of the people taken off of the distribution list?" CX 77, Tr. at 159. According to Nochumson, Andrews later told him that he had directed that the other names be deleted. Tr. at 159.

In addition, on April 25 Nochumson had a confrontation with Andrews over a fourth memo.[14] In the memo, which is addressed to Andrews, Nochumson again described the Laboratory's non-compliance with Subpart H as a matter of "public concern" and accused HSE-8 (Eberhart's section) of "breaking their agreement" to have Radian Corporation do a survey of radioactive air emissions. CX 78. According to Andrews' notes of what he described as a "verbal counselling session," Nochumson indicated that he did not want to change the statement in the memo about HSE-8 and did not want to change the distribution on the memo. CX 76. Andrews' notes also indicate that he told Nochumson that he should "work with us instead of against us" and was not justified in adding to memos whatever he thought was appropriate "regardless of whether I asked him not to include other unrelated information." Id. At the conclusion of his notes, Andrews wrote that Nochumson "still disagreed and would not voluntarily change his position." Id.

During a nine-day period during the middle of April a DOE consultant and employees from the DOE's Albuquerque office came to the Laboratory to consult with Laboratory employees about the Laboratory's problems in complying with Subpart H. CX 96. Nochumson participated in some meetings with these visitors, but did not attend the so-called "close-out" meeting. CX 96, Tr. at 172-73.

During May of 1991 Nochumson's supervisors began a series of formal attempts to change Nochumson's behavior. The first of these was an attempt to have Nochumson participate in a mediation process sponsored by the Laboratory's Human Relations Division (hereinafter referred to as "HRD"). This effort was initiated in a May 3 hand-written memo from Graf to Andrews. RX 5. In the memo Graf wrote:

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[14] Although the memo is not specifically identified in the record, it is apparently CX 78.

> Dave has done a nice job of documenting his failure to accomplish what we hired him to do.[15] It doesn't appear that he's made a good faith effort in any of these areas. Let's set up a meeting with the BSE-2 (or HRD) counsellors and see if we can get him off the dime. This is too important an area to let him keep screwing up. Based on our meeting with HSE/HRD either he agrees to (at least try to) show some progress or we need to reassign responsibilities. We need to move on this soon.

In an apparent response to this memo, on May 7 Andrews spoke with Deanne Phillips (hereinafter "Phillips"), a section leader in the Employee Relations Counselling Section of HRD. RX 136, Tr. at 827, 833-38. According to notes made by a subordinate of Phillips, Andrews had requested the meeting because he had a "staff member who has been exhibiting performance problems for about six months." The following five specific types of "performance problems" were listed in the notes: (1) "speaking for the group when [he] has no authority," (2) "accusing S.L. [Section Leader Andrews] & G.L. [Group Leader Graf] of hiding things from EPA and DOE," (3) complaining that Andrews "harasses" him, (4) responding "I don't see it that way" when confronted, and (5) refusing a request to make changes in the contents of a report. RX 136.

During the meeting between Phillips and Andrews, Phillips recommended that Andrews and Nochumson participate in a process called dual advocacy mediation. RX 110. Andrews agreed to participate and also said that he would talk to Nochumson about joining in the mediation effort.[16] Id. At the same meeting Andrews was given the name of a counsellor (Jerry Cooke) who was assigned to work with Nochumson and an appointment was made for Cooke to meet with Nochumson on May 9. Id., Tr. at 839. According to Phillips, dual advocacy mediation is a process in which each employee who is involved in a dispute is assigned a personal counsellor who meets privately with the individual to identify and "formalize" the employee's "issues." Tr. at 830. After this is done, joint mediation sessions involving both the employees and the counsellors are held. Tr. at 830-31. When asked if this process has a "disciplinary connotation," Phillips responded, "No. No, not at all." Tr. at 832.

After meeting with Phillips, Andrews told Nochumson about the mediation process and the appointment with Cooke. CX 90 at 1869.

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[15] Graf believes that this statement referred to a status report that Nochumson had recently submitted. Tr. at 715. Although not specifically identified by Graf, the status report is probably the quarterly RAEM report for January-March, 1991. CX 77.

[16] At a later date Graf also agreed to participate in the process. RX 110.

Andrews also told Nochumson that the process was voluntary and not disciplinary. Id. Nochumson then spoke with Cooke, who, according to Nochumson, told him the appointment was for employee counselling, not mediation. Tr. at 166. During the conversation Nochumson seemed to be distrustful of the process and cancelled the appointment for May 9. RX 182, RX 183, Tr. at 839. According to Nochumson, on May 10 he complained to Andrews about setting up the appointment with Cooke and Andrews responded by saying that he "could do away with" Nochumson's position.[17] CX 90 at 1870. Thereafter, Phillips called Andrews and suggested that he consider a "fitness for duty" evaluation. RX 182, Tr. at 839-42. According to Phillips, such an evaluation in effect provides a way of forcing an employee to seek help from HRD's Employee Assistance Program ("EAP") in resolving "personal issues." Tr. at 840-41. Phillips also testified that supervisors at the Laboratory were "instructed" to try to resolve problems with employees through the EAP process "before proceeding with corrective and disciplinary action." Tr. at 842. However, before Nochumson could be referred to the EAP he contacted Cooke and said that he would be willing to mediate. Tr. at 843. On May 21 Phillips informed Andrews of Nochumson's willingness to proceed with mediation, but Andrews told her that he "had decided to proceed with a written counselling." RX 182.

On May 10 Graf sent to Nochumson a three-page memo on the subject of "performance improvement." CX 81. In the first paragraph Graf wrote that he was sending the memo to Nochumson because "multiple attempts" to orally communicate with Nochumson about his "communication and performance" had "apparently failed." Graf then asserted that Nochumson's "communication style" was "negatively affecting" Nochumson's ability to accomplish his work assignments and that Nochumson's memoranda to other Laboratory employees appeared to be both "supercilious" and designed to get others to do work that Nochumson himself should have been performing. Graf further explained that he had directed Andrews to set up an appointment with a Laboratory counsellor for the purpose of providing Nochumson with assistance in overcoming this alleged problem. The memo then criticized the substance of Nochumson's job performance on the grounds that Nochumson's proposal for achieving compliance with Subpart H "was entirely too vague" and because Nochumson had proceeded to "further refine and multiply" the requirements for compliance rather than presenting "a proposal with sufficient specificity to have any hope of being funded." The memo further informed Nochumson that in the future any information he needed from others would have to be requested through Graf or Andrews and that all of his job-related correspondence would have to have the "specific concurrence" of Graf or Andrews. The memo

[17] As previously noted, Andrews has acknowledged that he made such a statement at least once and maybe twice. Tr. at 788-90. However, Andrews characterizes such statements as merely being offers to reassign Nochumson if he wanted to be reassigned. Id.

also informed Nochumson that he was free to express his views "anywhere, anytime," but that he could not necessarily attribute those views to any part of the Laboratory or to the DOE. In the concluding paragraph Graf wrote, "I admire your consistency and your steadfastness in maintaining your personal integrity. However, integrity is not in and of itself a marketable commodity unless it accompanies some productive activity."[18]

Within a few days after sending the May 10 memo to Nochumson, Graf prepared another memo which was captioned "Written Counselling" and used much of the same language used in the May 10 memo. CX 83. In addition, this memo set forth some more specific job requirements and concluded with a statement directing Nochumson to appear for a fitness for duty evaluation. However, the dates of the fitness for duty evaluation were left blank. Other evidence indicates that Stafford reviewed the draft memo and told Graf not to send it until after Stafford met with Nochumson on May 22. RX 27. In fact, the memo was never sent to Nochumson and apparently he was never actually instructed to appear for a fitness for duty evaluation.

The evidence also indicates that at the same time Graf sent the draft "written counselling" memo to Stafford, he also sent Stafford a memo entitled "Perfect Employee Position." CX 84. In that memo Graf informed Stafford that Nochumson was refusing to follow the directives of his supervisors and was characterizing suggested changes in his behavior as "harassment." The memo also stated that there was considerable disagreement between Nochumson and other Laboratory employees concerning Nochumson's conclusions concerning the Laboratory's Subpart H compliance and that much of the disagreement concerned "the way" in which Nochumson expressed his conclusions. The memo concluded with a statement asserting that since HSE had "notified our management and DOE of the potential non-compliance" it was not "hiding" anything but that "significant controversy" could nonetheless result from Nochumson's allegations.

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[18] During the hearing Graf testified that he was dissatisfied with essentially four aspects of Nochumson's performance: (1) Nochumson's failure to prepare data for the RAEM monthly and quarterly reports in a timely manner, (2) Nochumson's failure to produce stack-by-stack cost estimates for Subpart H compliance, (3) Nochumson's allegedly unjustifiable use of the term "large uncertainties" when describing the data from the Laboratory's existing stack monitoring system, and (4) Nochumson's style of "communication," which, in Graf's opinion, caused friction with other Laboratory employees. Tr. at 677-89, 695, 701-02, 704. Likewise, Andrews testified that he found similar deficiencies in Nochumson's behavior. Tr. at 776-82.

On May 20 Nochumson made an appointment with Puckett, the HSE Division Director, to discuss his allegations that he was being harassed by Graf and Andrews. RX 187 at 41. However, the next day he was told that he should first meet with Stafford. Id. Accordingly, on May 22 Nochumson met with Stafford to discuss his complaints against Graf and Andrews. RX 139. At the meeting he gave Stafford a ten-page, single-spaced document entitled "Harassment of David Nochumson by His Supervisors and Recommendations for Corrective Action." RX 30. In the memo Nochumson recounted the problems he had encountered in obtaining funding for Subpart H compliance efforts and described his various confrontations with Andrews and Graf in detail. After the meeting Stafford wrote a brief "note to file," in which he remarked that Nochumson could "never understand that we have informed EPA of our known level of deficiencies."[19] The note to file also stated that Nochumson answered "I don't know" when asked what else the Laboratory could do and generally appeared to be "preoccupied." According to Nochumson's contemporaneous notes of the meeting, Stafford complained that Nochumson had "gone over his head" by trying to arrange a meeting with Puckett and pointed out to Nochumson that he had handled "these types of matters" before, including "four terminations." CX 48 at 1370. Nochumson's notes also indicate, however, that Stafford did offer to try to "mediate" Nochumson's dispute with Andrews and Graf. RX 153 at 123, Tr. at 629. Two days later Nochumson again spoke with Stafford. At that time Stafford told Nochumson that he would like to serve as an "arbitrator" in the dispute. RX 153 at 125. Nochumson responded that he would think about the offer. Id., Tr. at 641-42. Nochumson never followed up on Stafford's offer, but did agree at approximately this same time to participate in the HRD Division's dual advocacy mediation process. RX 182.

On May 31 Stafford and Gunderson sent a memo to Puckett, the Director of HSE, recommending that on July 1, 1991, responsibility for the Laboratory's RAEM program be transferred from the three HSE groups in which it then resided to HSE-8, which already had responsibility for monitoring the Laboratory's non-radioactive air emissions. RX 159. The memo also noted that an additional 3.6 employees should be assigned to the program and that $250,000 would be needed for contract support.

On June 4, 1991, Nochumson sent his complaint under the provisions of section 7622 of the Clean Air Act to the Department of Labor. In the complaint Nochumson listed various deficiencies

[19] In fact, at the time of Nochumson's meeting with Stafford the Laboratory had not informed EPA of its non-compliance. Rather, the Laboratory had only recommended that the DOE send a such notification to the EPA. The DOE did not actually send a notification of non-compliance to the EPA until June of 1990--almost a full month after Nochumson's meeting with Stafford. CX 93.

in the Laboratory's RAEM program and alleged that his supervisors appeared to be very concerned with concealing these deficiencies from "the relevant government agencies" and the public. CX 86. He also alleged that his efforts to get the Laboratory to do more to comply with Subpart H had caused his supervisors to direct "intimidation, threats and harassment" against him. On June 6, Nochumson informed Graf that he filed the complaint and apparently Graf immediately informed Puckett. RX 102. On the next day Puckett arranged a meeting with Nochumson. In a memo concerning the meeting Puckett represented that he told Nochumson that he was "very frustrated" with the action and found Nochumson's failure to go through the Laboratory's internal dispute resolution mechanisms "very, very disappointing." RX 103. On June 6 Nochumson also spoke by phone with Stafford and was told that the RAEM program and its funding would be transferred to HSE-8, but that none of the people assigned to the program would transferred with it. CX 85, RX 153 at 144, Tr. at 652. In addition, Stafford told Nochumson that he would be reassigned to the Radiological Engineering Section in HSE-12. Id., Tr. at 175. Only a month before, however, Stafford had told Nochumson that if the RAEM program were moved to HSE-8, Nochumson would have the option of moving with the program or staying in HSE-1. RX 153 at 47, Tr. at 650.

On the day after his conversation with Stafford Nochumson spoke with Tom Gunderson (hereinafter "Gunderson"), the Deputy Division Leader in charge of HSE-8, about possibly transferring to HSE-8 along with the RAEM program. RX 187 at 44-45. Gunderson told Nochumson that he would have to speak with Ken Hargis (hereinafter "Hargis"), the Group Leader for HSE-8. Tr. at 176. When Nochumson did so, Hargis was, in Nochumson's words, "visibly angry" and said that he did not want Nochumson in his group because he did not like Nochumson's memo concerning Eberhart's alleged failure to honor the agreement on the Radian Corporation survey and because he didn't like Nochumson's practice of talking to DOE officials in Albuquerque. Tr. 176-77. It thus appeared to Nochumson that he would no longer be allowed to work on the RAEM program. Nochumson described this prospective change in his work assignments in a June 18, 1991 summary of "Acts of Discrimination" and gave it to a Department of Labor investigator on July 3, 1991. CX 90, Tr. at 885-87.

On June 13 Stafford met with Graf, Andrews, and Nochumson concerning Nochumson's complaints. RX 85. At the meeting it was apparently agreed that the two memos on which Andrews had limited the distribution would be distributed to the persons on the original distribution lists. Id. Stafford's notes of the meeting also indicate that he asked Nochumson what he wanted to do when the Health Physics Function was reorganized and suggested that Nochumson select something that would "make him happy" and be helpful to the Laboratory. Id.

On June 25, 1991, Jerry Bellows, the Area Manager for DOE's Los Alamos Area Office, sent the Laboratory's 1990 annual report of radioactive air emissions to the EPA's regional office in Dallas, Texas. CX 93, CX 94. In the cover letter Bellows set forth what was described as a review of "the status of airborne radionuclide emission monitoring" at the Laboratory. CX 93. In doing so the letter informed the EPA for the first time that a "preliminary evaluation indicates that compliance with [the monitoring requirements of Subpart H] cannot be demonstrated for most of the [Laboratory's] stacks."[20] The letter further represented that although the Laboratory could not demonstrate compliance with the stack monitoring requirements of Subpart H, the Laboratory's ambient air monitoring system "had confirmed" that radioactive air emissions were nonetheless in compliance with the 10 millirem standard adopted by the EPA in 1989. In concluding, the letter indicated that the Laboratory would soon be submitting a formal request for waiver of the stack monitoring requirements.

Although the transfer of the RAEM program was initially scheduled to take place on July 1, sometime in the latter part of June the transfer date was indefinitely postponed, possibly for the purpose of giving Gunderson more time to learn about the program. CX 97 at 1933, Tr. at 654. By this time, however, Andrews had resigned as the leader of Nochumson's section. Tr. at 118, CX 98, RX 110. On July 9, Nochumson was told by Graf that his new supervisor would be Bill Eisele (hereinafter "Eisele"). RX 153 at 190, Tr. at 653-54. At that time Eisele was the acting section leader of a section that had not yet been given a title. RX 153 at 190. Graf also told Nochumson that he was, nonetheless, still assigned to the RAEM program. RX 153 at 193, Tr. at 654. The next day Nochumson met with Eisele and told him that he "did not wish to continue to work on the RAEM program." RX 153 at 195, Tr. at 655-56. According to Nochumson, he made this statement because he was "under a lot of stress" as a result of "the acts of harassment" and "couldn't take it anymore." Tr. at 656. Nochumson also asserted that by this time he had already been "excluded from important meetings" and "effectively removed" from his role in the program. Tr. at 117-18, 656. He also testified that at this time he thought his job was "in jeopardy" and that his only option in terms of

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[20] Although the Laboratory had sent a draft notice of non-compliance to the DOE's Los Alamos office in March of 1991, on May 10, 1991, representatives of the DOE and the Laboratory decided to re-word the draft notice and incorporate it into the cover letter accompanying the Laboratory's 1990 annual air emissions report. RX 79. According to Nochumson, he was invited to some of the meetings with the DOE representatives concerning the Laboratory's RAEM program, but not to later meetings, including apparently the meeting where it was decided to further delay notifying the EPA about the Laboratory's non-compliance with Subpart H. Tr. at 172-73.

keeping his job was to get out of the RAEM program. Tr. at 657-59. Likewise, on July 11, Nochumson called Stafford and said that he did not wish to continue working on the RAEM program. Id., RX 153 at 199. According to Nochumson, he also told Stafford that he did want to continue working under Eisele, but on some other type of assignment. Tr. at 658. Stafford's notes of the conversation indicate that Nochumson gave two reasons for his decision to stop working on the RAEM program: the Laboratory's lack of support for the program and dissatisfaction with the way in which he had been treated. Id.

The record indicates that in the normal course of business Nochumson would have received a performance appraisal by the end of July 1991. RX 75 at 5. However, work on the appraisal was suspended when the Laboratory received notice of Nochumson's complaint to the Department of Labor and thereafter Nochumson did not receive any further performance appraisals until 1993, when he got an appraisal that covered only the period between April 1, 1992, and April 30, 1993.[21] Id., CX 164, Tr. at 121. Consequently, Nochumson has never been given a performance appraisal for the period between April of 1990 and March 30, 1992.[22]

Beginning in August a number of different entities outside the HSE Division began to turn their attention to the Laboratory's RAEM program.

On August 7, for example, Frank H. Sprague (hereinafter "Sprague"), an environmental scientist in the Environmental Protection Division of the DOE's Albuquerque office, reported in an internal DOE memorandum that his two-week review of the Laboratory's RAEM program in April of 1991 had indicated that the Laboratory's radioactive air emissions monitoring was in various

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[21] This appraisal rated Nochumson as "fully satisfactory" in all performance categories. CX 164. Nochumson also received essentially satisfactory evaluations during the six-year period prior to his assignment to the RAEM program, but two of those evaluations did contain criticisms of Nochumson's "interpersonal skills." CX 4, CX 5. In addition, the record indicates that during the last ten years Nochumson has been formally commended for his work on various Laboratory projects on at least three occasions. CX 159, CX 162, CX 163.

[22] The record does, however, contain what appears to be a draft of Nochumson's appraisal for this period. RX 90. The draft appraisal rates Nochumson in the "Needs Improvement" category in all three aspects of his job performance (Job Knowledge/Problem Solving/Innovative Thinking/Initiative, Oral Communications/Documentation, and Customer Interface/Interpersonal Relationships). Id. The text of the draft appraisal can be fairly described as highly negative if not scathing.

ways not in compliance with the requirements of Subpart H, except at the Meson Physics Facility.[23] CX 106. His report also stated that the "information currently derived from the [stack monitoring] program is questionable," but noted that because of the "high quality" of the Laboratory's ambient air monitoring program, "it may well be possible for a competent auditor to verify that LANL is in compliance" with the 10 millirem exposure limit of Subpart H. Id.

Several weeks after Sprague completed his report, the Laboratory publicly released a lengthy Environment, Safety and Health Self Assessment (hereinafter referred to as "the Self Assessment") which had been drafted by Laboratory employees in preparation for a pending DOE "Tiger Team" assessment of the Laboratory's compliance with environmental, safety and health requirements.[24] In a section of the report concerning environmental issues, it was recognized that "not all points of potential release of radioactive air effluents to the environment are monitored in accordance" with Subpart H and that the "deficiencies include gas-stream characterization, location of sample extraction sites, sizing of sample extraction probes, documentation of sample transport line losses, verification of air flow measurements, and a Quality Assurance Program consistent with" the quality assurance methods mandated in 40 C.F.R. Part 61. RX 198 at 4-64. The report was also highly critical of many of the Laboratory's other practices, and in the report's executive summary the Laboratory's Director acknowledged that the Laboratory's past successes had led to an "over-familiarity and arrogance" which had in turn "led to complacency towards ES&H." RX 198 at ES 1, Tr. at 74-75. The executive summary also observed that there was "the lack of a 'safety culture' at the Laboratory," and that there was a tendency for Laboratory staff to "ignore ownership of ES&H problems." Id.

In addition, during the third week in August, Puckett, Andrews, and Buhl met with EPA officials in Dallas, Texas, and presented a "Tentative Compliance Action Plan for Air Effluent Monitoring." At the meeting the EPA officials indicated that the EPA would be issuing a formal "Notice of Violation" against the Laboratory as the first step toward negotiating a FFCA that would

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[23] As previously noted, it is estimated that the emissions from the Meson Physics Facility account for approximately 95 percent of all of the Laboratory's radioactive air emissions. See CX 141.

[24] The "Tiger Team" assessment was part of a DOE program to critically evaluate the safety of operations at various DOE-owned facilities, including the Laboratory. Tr. at 41. According to the Laboratory's Deputy Director, the purpose of the evaluations was "to look for difficulties." Tr. at 43.

establish a time schedule for compliance with Subpart H.[25] CX 113, CX 114. The Tentative Compliance Action Plan that was given to the EPA officials noted that as part of the Laboratory's efforts to begin complying with Subpart H, it had already entered into contracts with Southern Research Institute and Radian Corporation, i.e., the two contracts that had been the subject of Nochumson's prior disputes with others at the Laboratory. CX 113.

Also during August, Siegfried Hecker, the Laboratory's Director, responded to the complaints of Nochumson and others by setting up a special three-member "Air Emissions Task Force" to conduct a "quick look" review of the Laboratory's air emissions monitoring program. CX 115. On September 9 the task force issued a report which concluded that although the Laboratory's existing RAEM program was not in compliance with Subpart H, there was "no reason for immediate alarm." CX 117 at 2063. The report also stated that despite this lack of full compliance, the existing program was "adequate to protect both Laboratory employees and the general public" from "significant levels" of radioactive emissions. Id. In the text of the report it was also noted that at the Laboratory, "funds for corrective action are closely tied to receipts of notices of violations." Id. at 2076.

In November of 1991 the DOE released the multi-volume report of the "Tiger Team" that had conducted an extensive review of the Laboratory's environment, safety and health program. RX 199. The report's executive summary stated that among the "key areas of concern" at the Laboratory was "inadequate identification, monitoring, and control of effluent releases." CX 131 at 2195. The report listed 12 specific deficiencies in the Laboratory's RAEM program and noted that the list was "not meant to be all inclusive." CX 127 at 2147-50. During the same month Stafford met with various DOE officials in the Washington D.C. area and at that time indicated that the Laboratory was then estimating that the cost of complying with Subpart H would be approximately $750,000 per stack and total over $100 million. CX 129.

C. Evidence of Independent Psychological Stress on Nochumson

The record also shows that during the entire period that Nochumson worked as the RAEM manager the stresses of his job were

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[25] The EPA's formal Notice of Noncompliance was issued on November 27, 1991. CX 135. Among other things, the Notice charged that the DOE was in non-compliance with the Clean Air Act because it was not monitoring all sources of radionuclides and because most of the monitoring systems that were already in place failed to meet the design and quality assurance requirements of Subpart H. The Laboratory's most recent plan for achieving eventual compliance with Subpart H is set forth in an October 6, 1993 document that was sent to the EPA in December of 1993. CX 143, CX 144.

compounded by the fact that his wife was undergoing treatment for what ultimately proved to be terminal cancer. The cancer was initially diagnosed while Nochumson, his wife, and their two children were on a sabbatical in Israel in the summer of 1989. Tr. at 374. As a result of the diagnosis they returned to Los Alamos and Nochumson's wife began undergoing cancer treatments. Id. These treatments were initially successful and the cancer went into remission. However, in September of 1990 the cancer reappeared and Mrs. Nochumson had to go to the Boston area to undergo a prolonged program of preparation for a bone marrow transplant. Tr. at 374-82. Nochumson remained in Los Alamos and assumed primary responsibility for the care of his two children, both of whom were then under ten years of age. Id.

About a month before the September 1990 relapse, Nochumson had begun receiving psychological counselling from Linda Dutcher, Ph.D., a clinical psychologist who practices in the Los Alamos area. Tr. at 180, 322-23. The counselling was originally prompted by marital problems between Nochumson and his wife and by Nochumson's desire to improve his interpersonal communications skills, but because of the relapse in his wife's condition, much of the counselling soon began to focus on Nochumson's anxieties about his wife's health. Tr. at 322-23. Later on, the counselling also focused on job-related anxieties. Tr. at 323-25. At about this same time Nochumson also began taking a prescription medication for anxiety. Tr. at 383-85, RX 167. In addition, Nochumson's children began seeing a psychologist to help them cope with the stress of their mother's illness. Tr. at 386. In March of 1991 Nochumson's wife underwent the bone marrow transplant, and in May returned to Los Alamos. Tr. at 387-88, 484. It initially appeared that the bone marrow transplant had been successful, but Mrs. Nochumson was experiencing side effects from her treatments that made her angry and irritable. Tr. at 389, 484. This anger and irritability apparently aggravated pre-existing marital stresses and in the fall of 1991 Nochumson decided to ask his wife for a divorce. Tr. at 180, 380. However, shortly thereafter, there was a second relapse in Mrs. Nochumson's condition and she died in December of 1991. Tr. at 389.

A short while after learning about his wife's second relapse, Nochumson began receiving treatment from Dr. Jeffrey Ross, a psychiatrist. Tr. at 288-90. On October 25, 1991, Dr. Ross sent a note to the Laboratory which stated that he had advised Nochumson to take sick leave for as long as several months in order to help him recover from what Dr. Ross described as "an adjustment reaction to situational stress." CX 123. On the same date Nochumson advised Eisele that he would be taking sick leave and taking his children to Rhode Island, where his wife was then residing. RX 137. Shortly after Nochumson's wife died, he returned to New Mexico with his children. However, based on the recommendation of Dr. Ross, he remained off work until November of 1992, when he resumed working on a part-time basis. Tr. at 182, RX 174, RX 178.

After returning to work in 1992 Nochumson was assigned to instruct other Laboratory workers on matters related to nuclear safety, a job which he finds enjoyable but less challenging than his prior job assignment. Tr. at 115-16. According to Dr. Ross, at least some of the psychiatric problems that prevented Nochumson from returning to work before November of 1992 were related to the stresses of his job. Tr. at 297-99, RX 179, RX 176, RX 177. Nochumson himself attributes about 60 percent of his disability to work-related stress, but Dr. Ross testified that he cannot assign any particular percentages to the various causes of the disability. Tr. at 181-82 (Nochumson testimony), Tr. at 316-18 (testimony of Dr. Ross).

ANALYSIS

The legal standard for determining if a respondent violated the whistleblower provisions of the Clean Air Act and similar statutes is well established.[26] In particular, a complainant must initially present a prima facie case consisting of a showing that he or she engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some adverse action against the complainant. In addition, as part of the prima facie case the complainant must present evidence sufficient to raise the inference that the complainant's protected activity was the likely reason for the adverse action. If the complainant establishes a prima facie case, the employer then has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. At this point, however, the employer bears only a burden of producing evidence, and the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. If the respondent successfully rebuts the employee's prima facie case, the employee still has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This may be accomplished either directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. In either case, the factfinder may then conclude that the employer's proffered reason is a pretext and rule that the complainant has proved actionable retaliation for the protected activity. Conversely, the trier of fact may conclude that the respondent was not motivated in whole or in part by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance

[26] It is clear from the evidence in the record that the Laboratory is an employer subject to the requirements of the Clean Air Act and that Nochumson is an employee covered by the Act's provisions governing whistleblowers. Indeed, the parties have so stipulated. Tr. at 7-8.

of the evidence. Finally, the factfinder may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had dual or mixed motives. In such a case, the burden of proof then shifts to the respondent to show by a preponderance of the evidence that it would have taken the same action with respect to the complainant even in the absence of the employee's protected conduct. Guttman v. Passaic Valley Sewerage Commission, 88-WPC-2 (March 13, 1992), aff'd sub nom. Passaic Valley Sewerage Commissioners v. U.S. Dep't of Labor, 992 F.2d 474 (3rd Cir. 1993); Darty v. Zack Company, Case No. 80-ERA-2, Decision and Order, April 25, 1983. See also Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977); NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

A. Nochumson's Prima Facie Case

As explained above, in order to establish a prima facie case a complainant must show: (1) that he engaged in protected activity, (2) that the respondent knew of the protected activity, (3) that the respondent took adverse action against him, and (4) that the protected activity was the likely reason for the adverse action. For the reasons set forth below, I find that the claimant has made all four of these showings.

1. Protected Activities

The employee protection provisions of the Clean Air Act focus primarily on employees who commence or participate in formal enforcement proceedings and do not explicitly refer to employees who merely make intra-corporate complaints about possible Clean Air Act violations. See 42 U.S.C. §7622(a). However, the Secretary of Labor has determined that these provisions and similarly-worded provisions of comparable statutes should be broadly interpreted so as to also protect those employees who make only internal complaints. Although the Fifth Circuit has disagreed with this determination, Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984), courts of appeals in at least six other circuits, including the Tenth Circuit, have upheld the Secretary's interpretation of such statutes. See, e.g., Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2nd Cir. 1982) (implicit); Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F.2d 474 (3rd Cir. 1993); Jones v. Tennessee Valley Authority, 948 F.2d 258, 264 (6th Cir. 1991); Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) (implicit); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); Pogue v. United States Department of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991); Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505, 1513 (10th Cir. 1985).

The Secretary has also broadly defined the types of internal complaints that are considered to be protected activities under the Clean Air Act and similar statutes. For instance, the Secretary has held that "mere questioning" of safety procedures is tantamount

to an internal complaint and therefore a protected activity. Nichols v. Bechtel Construction, Inc., Case No. 87-ERA-44, Decision and Order of Remand, Oct. 26, 1992. Likewise, the Secretary has held that all employees who are engaged in quality control functions are engaged in protected activities. Bassett v. Niagara Mohawk Power Company, Case No. 86-ERA-2, Order of Remand, July 9, 1986. Similarly, the Secretary has also held that an alleged violation of the Clean Air Act does not have to comprise the only or even predominant subject of a complaint, and that an internal complaint will be regarded as a protected activity so long as it at least "touches on" compliance with the Act. Scerbo v. Consolidated Edison Company, Case No. 89-CAA-2, Decision and Order, Nov. 13, 1992. The Secretary has also held that an internal complaint need not be shown to be meritorious in order to entitle an employee to the protection of a whistleblower statute. Id., see also Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992). Rather, such an internal complaint need only be based on a reasonable perception of a violation. See Johnson v. Old Dominion Security, Case No. 86-CAA-3, Decision and Order, May 29, 1991. Finally, the Secretary has held that the act of filing a whistleblower complaint is in itself a protected activity. McCuistion v. Tennessee Valley Authority, Case No. 89-ERA-6, Decision and Order, Nov. 13, 1991.

This case arises in the Tenth Circuit. Accordingly, if Nochumson can show that he made a complaint, either internally or to a law enforcement agency, that in some way touched upon a reasonably perceived violation of the Clean Air Act, he will have established that he engaged in an activity that is protected under the whistleblower provisions of the Clean Air Act. From the record, it is abundantly clear that Nochumson has in fact satisfied this burden. Indeed, the record shows that over a period of approximately six months Nochumson repeatedly made various types of internal complaints concerning the nature of the Laboratory's compliance with the requirements of Subpart H. As well, the record also shows that he unquestionably engaged in two other types of protected activity: he made his complaints known to an official of the EPA and he filed a whistleblower complaint with the Department of Labor.

2. Respondent's Knowledge of the Protected Activities

The second element of a prima facie case requires proof that the respondent was aware of a complainant's protected activities prior to the occurrence of the alleged retaliatory acts. This requirement has also been clearly satisfied. In addition to showing that Nochumson's supervisors were fully aware of his various internal complaints, the record also shows that these supervisors knew of Nochumson's contacts with the EPA and were aware of the fact that he had filed a whistleblower complaint with the Department of Labor.

3. Adverse Actions

In order to establish the third element of a prima facie case, there must be proof that the respondent in some way took an action that was adverse to the complainant. In applying this standard, the Secretary and the appellate courts have defined the concept of adverse action very broadly. For example, it has been determined that an adverse action need not necessarily have any economic impact and that even negative comments in an otherwise favorable performance evaluation can by themselves constitute an adverse action. Bassett v. Niagara Mohawk Power Corporation, Case No. 85-ERA-34, Final Decision and Order, Sept. 28, 1993.[27] Similarly, it has been held that disciplinary or warning letters that serve to progress an employee toward suspension or discharge are also adverse actions. Helmstetter v. Pacific Gas & Electric Co., Case No. 86-SWD-2, Final Decision and Order, Sept. 9, 1992. In addition, it has been held that transferring an employee to a less desirable job can amount to an adverse action. DeFord v. Secretary of Labor, 700 F.2d 281, 283, 287 (6th Cir. 1983). Finally, it has been held that it is an adverse action to create a "hostile work environment." English v. Whitfield, 858 F.2d 957, 963 (4th Cir. 1988) (holding that when a supervisor harasses a subordinate because of the subordinate's protected conduct, the supervisor discriminates on the basis of the protected conduct); Scerbo v. Consolidated Edison Company, Case No. 89-CAA-2, Decision and Order, Nov. 13, 1992.

In this case, Nochumson alleges that the Laboratory engaged in a variety of different adverse actions against him, including harassment. The Laboratory, on the other hand, in effect contends that it did not engage in any type of activity that can be justifiably characterized as an adverse action.

The various activities that could conceivably constitute adverse actions fall into essentially the following seven categories: (1) the repeated criticisms by Andrews and Graf of Nochumson's views concerning the Laboratory's RAEM program, (2) the attempt to have Nochumson participate in dual advocacy mediation, (3) Andrews' statement's concerning his ability to abolish Nochumson's job, (4) the limitations on Nochumson's ability to directly send memos to other Laboratory employees, (5) the "performance improvement" memo sent to Nochumson on May 10, 1991,

[27] In addition, in Bassett the Secretary held that although a respondent's motive may be relevant when considering other issues in a whistleblower case, it is not relevant when determining whether a particular action constitutes an adverse action. In the same decision the Secretary also held that a complainant need not prove that he was treated differently from other similarly situated employees in order to establish the existence of an adverse action.

(6) Puckett's expression of "disappointment" and "frustration" with Nochumson's decision to file a whistleblower complaint with the Department of Labor, and (7) the Laboratory's refusal to allow Nochumson to transfer to HSE-8 along with the RAEM program.

In view the existing case law, I find that the first two categories of possible adverse actions do not come within the Secretary's definition of an adverse action, but that the activities within latter five categories do constitute adverse actions.

In the first category of possible adverse actions are the various occasions on which Andrews and Graf disputed Nochumson's criticisms of the Laboratory's RAEM program and directed him to change what he had written in various memoranda and reports concerning the RAEM program. It is, of course, a supervisor's responsibility to oversee the work of subordinates, to disagree with them when they appear to be mistaken, and to direct them to perform their jobs in manner expected by the employer. By itself such supervision cannot constitute an adverse action. Indeed, any other rule would mean that a supervisor could violate the Clean Air Act's whistleblower provisions merely by directing an employee to act in a manner consistent with an employer's wishes.[28] Accordingly, I conclude that Andrews and Graf did not engage in adverse actions when they disagreed with Nochumson's views on the extent to the deficiencies in the Laboratory's RAEM program or when they directed him to make changes in written materials.[29]

The second category of possible adverse actions concerns the attempt by Graf and Andrews to have Nochumson participate in dual advocacy mediation. The evidence is convincing that, in general, the dual advocacy mediation process is not a disciplinary procedure and is instead a mechanism for making a good faith effort to reduce conflicts between co-workers by having both parties invest time and effort in discussing the nature of their disputes with counsellors and with each other. Such a process does not cause any diminution in the terms and conditions of employment. Accordingly, an effort to have an employee participate in such a process cannot be regarded as a form of adverse action. Indeed, the Secretary has reached this same conclusion in a recent case in which an employee was even required to undergo a medical examination as part of an

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[28] Of course, if the actions of the employee in carrying out the supervisor's instructions happen to contravene the requirements of the Clean Air Act, then the employer would be liable for violations of the Act's other provisions.

[29] It must be recognized, of course, that while such actions by Andrews, Graf or others do not by themselves constitute adverse actions, they do provide important evidence concerning the real motivation for other types of allegedly adverse actions.

Employee Assistance Program referral. Mandreger v. The Detroit Edison Company, Case No. 88-ERA-17, Decision and Order, March 30, 1994 (slip opinion at 14, 16).

The third type of conduct which may constitute an adverse action consists of the statements that Andrews made to Nochumson about his ability to abolish the RAEM manager's position, i.e., Nochumson's job. Although Nochumson regarded these statements as threats to abolish his job if he did not cease complaining about the Laboratory's failure to make a greater effort to comply with Subpart H, Andrews has asserted that they were only offers to transfer Nochumson to another job. Tr. at 659-61 (Nochumson testimony), Tr. at 788-90 (Andrews testimony).[30] Given the context in which these statements were made, i.e., during arguments between Andrews and Nochumson, it appears more likely than not that the statements were intended at least in part to be interpreted as threats rather than as mere offers to transfer Nochumson to a less frustrating job. Since threats to terminate a worker's employment have been found to constitute a form of adverse action, I find that Andrews' statements to Nochumson concerning his ability to abolish Nochumson's job amounted to an adverse action. See Griffin v. Michigan Dept. of Corrections, 654 F. Supp. 690, 695 (E.D. Mich. 1982); Mandreger v. The Detroit Edison Company, supra.

The fourth category of possible adverse actions is the limitation on Nochumson's ability to directly send memos to other laboratory employees. As previously explained, such a limitation occurred in April of 1991 when Andrews deleted most of the names from the distribution lists of two of Nochumson's memos and again in May of 1991 when Graf informed Nochumson that all of his job-related correspondence would have to have the specific concurrence of either Graf or Andrews. There are no reported decisions concerning this type of limitation on an employee's authority. However, it is apparent that in limiting Nochumson's ability to directly communicate with other Laboratory employees, Graf and Andrews had in effect diminished the scope of Nochumson's authority and therefore restricted the terms and conditions of his

[30] It is noted in this regard that during a 1994 deposition Nochumson testified in a manner that indicated that he did not regard Andrews' May 1991 statement as a threat. Tr. at 659-61, RX 218 at 836. However, at the hearing he testified that he may have misunderstood the deposition question and that he did in fact regard the statement as threatening. Id. Since Nochumson's contemporaneous entry in his work diary described Andrews' May 10 statement as if it were a threat, (i.e., the diary states that Andrews said "he created my position and he can do away with it"), I find that Nochumson did in fact find the statement to be threatening. RX 153 at 88. It is noted, too, that Nochumson also described the statement as threatening in his June 18, 1991 "Acts of Discrimination" memo. CX 90 at 1870.

employment.[31] Consequently, I conclude that this restriction on Nochumson's authority constituted an adverse action.

The fifth type of conduct that arguably constituted an adverse action is the "performance improvement" memo that Graf sent to Nochumson on May 10, 1991. As previously explained, this memo was highly critical of many aspects of Nochumson's work performance. It therefore constitutes a disciplinary or warning letter and must be regarded as a form of adverse action against Nochumson. See Helmstetter, supra.

Sixth, it is arguable that Puckett's expression of "disappointment" and "frustration" with Nochumson's whistleblower complaint to the Department of Labor constituted a type of adverse action. Although during the hearing Puckett testified that he didn't "blame" Nochumson for filing the complaint and was only "disappointed" that the Laboratory's internal resources were not used to try to resolve Nochumson's complaint, the memo to file that Puckett wrote about his June 7, 1991 meeting with Nochumson indicates that at the meeting he in effect directly criticized Nochumson for filing the complaint. Tr. at 597-98, RX 103. In particular, Puckett's memo states that he told Nochumson that he was "very frustrated with this action" and that he found it "very, very disappointing" that Nochumson was "not willing" to follow the Laboratory's internal procedures for resolving disputes of this nature. RX 103. The Secretary has recently held in a case involving a very similar fact situation that such critical comments about an employee's decision to file a whistleblower complaint constitute a form of intimidation or harassment. Mandreger, supra, (slip opinion at 19, 21 n. 4). Since I am bound by the Secretary's interpretation of the Act, I therefore find that Puckett's comments criticizing Nochumson for filing a whistleblower complaint amounted to an adverse action.

The seventh possible adverse action was the Laboratory's never-implemented decision to not allow Nochumson to transfer to

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[31] It is noted in this regard that Nochumson has also alleged that he was not invited to various meetings, e.g., the February 21 meeting between Andrews and Buhl and the "close-out" meeting that Laboratory employees held with the DOE employees who visited the Laboratory in April of 1991. See Tr. at 172-73. Although it does appear that in fact Nochumson was not invited to these meetings, there is insufficient evidence in the record to warrant the conclusion that the failure to invite Nochumson to these meetings was in any way a deviation from the Laboratory's normal practices. Indeed, in many bureaucracies staff-level employees are commonly not invited to meetings between management-level employees like Andrews and Buhl. Similarly, Nochumson may not have been invited to the "close-out" meeting with the DOE employees simply because his job was not a management-level position.

HSE-8 along with the RAEM program. According to the evidence, even though Nochumson had been told by Stafford in May of 1991 that he would be able to transfer to HSE-8 along with the RAEM program, two days after Nochumson filed his whistleblower complaint he was told that he would not be transferred with the RAEM program and that he would instead be reassigned to an unspecified job in the Radiological Engineering Section. CX 85, RX 153 at 47 and 144, Tr. at 652. As well, the evidence shows that the manager of HSE-8 explicitly refused Nochumson's subsequent request to be allowed to transfer into that section along with the RAEM program. As previously explained, an involuntary transfer of an employee to a less desirable job constitutes a form of adverse action. The transfer of Nochumson's job to another section and the other section leader's rejection of Nochumson's request to be allowed to transfer along with the job clearly amounts to an involuntary transfer. Thus, the only question is whether the other job to which Nochumson was to be transferred was less desirable than Nochumson's job as the RAEM manager. Although it appears that the salaries of staff members at the Laboratory are not directly related to their specific job assignments and that therefore the assignment to the Radiological Engineering Section would not have resulted in any diminution of Nochumson's salary, the record is otherwise silent concerning the relative desirability of the new assignment. Indeed, the testimony on this matter suggests that Nochumson's new duties had not in fact been defined by anyone and that they would not have been revealed to him until after he actually arrived in the Radiological Engineering Section. It is therefore difficult, if not impossible, to determine if the new job was less desirable than the RAEM manager's job. However, Nochumson's attempt to keep his position as RAEM manager suggests that at least Nochumson regarded the alternative job as being less attractive than the job he had. Accordingly, I find that the Laboratory's refusal to allow Nochumson to transfer along with the RAEM program amounted to an adverse action.[32] Although the planned transfer of Nochumson's job to HSE-8 never actually occurred and Nochumson was eventually told that he could remain in his position as the RAEM manager, the mere act of telling Nochumson that he would no longer be the RAEM manager was in and of itself an adverse action, just as giving someone a notice of their future termination

[32] In this regard, it is recognized that about a month after being informed that he would not be able to remain as RAEM manager, Nochumson told various superiors that he no longer wished to work on the RAEM program and wished instead to work in Eisele's section. The record is clear, however, that this decision was not motivated by any feeling that some alternative job was as desirable as the RAEM manager's job. Rather, it was motivated by Nochumson's perception that he had been harassed while trying to perform the RAEM manager's job and by his dissatisfaction with the Laboratory's efforts to comply with the requirements of Subpart H.

is an adverse action.[33]

Finally, in addition to all of his other allegations, Nochumson has also in effect alleged that the various individual adverse actions against him collectively subjected him to a hostile work environment, which is in itself a type of adverse action. The Supreme Court has determined that a hostile work environment exists when intimidation, ridicule, and insult are so severe or pervasive as to alter the conditions of the victim's employment. Harris v. Forklift Systems, Inc., ___U.S.___, 114 S.Ct. 367, 370 (1993). The Court has also held that although harassment need not be so severe as to result in a tangible psychological injury, it must be severe or pervasive enough to create "an environment that a reasonable person would find hostile or abusive" and must be subjectively perceived by the victim to be abusive. Id. In this regard, the Court pointed out that all relevant circumstances have to be considered in determining whether a work environment is hostile and that such relevant circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 371. The Court also pointed out that "'mere utterance of an ... epithet which engenders offensive feelings in a employee'" is not sufficient by itself to qualify. Id.

As already explained, in a substantial number of instances Nochumson's supervisors took actions that were in and of themselves adverse to Nochumson. Thus, it has already been determined that Nochumson has provided sufficient evidence to establish the third element of a prima facie case and it is unnecessary for him to also prove that this same conduct collectively resulted in the creation of a hostile work environment. Accordingly, this contention need not be exhaustively explored. However, it is briefly noted that the evidence does suggest that Nochumson was in fact subjected to a hostile work environment. Not only did Nochumson subjectively perceive that he was working in a hostile environment, it is also more likely than not that a hypothetical "reasonable person" would have also found the work environment to be hostile. As already explained, during a single five-month period Nochumson's supervisors threatened to abolish his job, limited his ability to communicate with other Laboratory employees, reprimanded him in a "performance improvement" memo, criticized him for filing his whistleblower complaint, and told him that his job would be moved to another section into which he could not transfer. In such circumstances, most reasonable people would perceive that they were

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[33] Indeed, it has been held that for statute of limitations purposes an adverse action occurs when notice of a decision to terminate an employee is conveyed to the employee, rather than when the decision is actually carried out. English v. Whitfield, 858 F.2d 957, 960-63 (4th Cir. 1988).

working in a hostile environment.

4. Inference of a Causal Connection Between the Protected Activity and the Adverse Action

In order to establish the fourth and final element of a prima facie case a complainant must present evidence sufficient to raise the inference that the complainant's protected activity was the likely reason for the adverse action or actions. The motives for adverse actions against employees are necessarily subjective and for this reason it is rare that there is direct evidence of any connection between an employee's protected activities and an adverse action against the employee. However, it is well established that such a connection can be proven by circumstantial evidence. See, e.g., Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984). Thus, for example, it has been held that the proximate timing of the protected conduct and the adverse action can be sufficient to raise the inference of causation. Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980). See also Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982); NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2nd Cir. 1982).

In this case, the evidence shows a strong connection between Nochumson's protected activities and the adverse actions against him. This evidence is both circumstantial and direct.

The circumstantial evidence of a causal relationship between Nochumson's protected activities and the adverse actions is of two types. First, there is a close temporal relationship between many of Nochumson's protected activities and the adverse actions. For example, both of Andrews' statements about possibly abolishing Nochumson's position occurred during periods when Nochumson was expressing doubts about the safety of the Laboratory's RAEM program and complaining about the Laboratory's efforts to come into compliance with the requirements of Subpart H. Likewise, only a short time after Nochumson had written a series of memoranda that implied that the Laboratory was not making a "good faith" effort to comply with the requirements of Subpart H, Nochumson was given a "performance improvement" memo and told that the distribution of his internal memoranda was being curtailed. There is also a close temporal relationship between Nochumson's protected activities and the Laboratory's decision to refuse to allow Nochumson to transfer to HSE-8 along with the RAEM program. In fact, Nochumson was told of this decision within a matter of hours after he informed his supervisor that he had filed a whistleblower complaint. RX 153 at 140-45.

The second type of circumstantial evidence of a causal

relationship is the evidence that demonstrates that both Andrews and Graf vigorously disputed Nochumson's complaints about the Laboratory's RAEM program and repeatedly cautioned him against repeating such complaints. For instance, when Nochumson alleged that the RAEM program's deficiencies raised potential safety problems, Andrews disputed the allegation and warned Nochumson such statements could end up in the newspapers. Andrews' dissatisfaction with Nochumson's complaints is also illustrated by the fact that among the "performance problems" he listed when he first spoke to the Human Relations Division was Nochumson's claim that the Laboratory was "hiding things" from the EPA. Likewise, Graf also demonstrated that he too was strongly opposed to Nochumson's criticisms of the RAEM program. For example, he forcefully informed Nochumson in writing that the RAEM program's deficiencies were not a cause for "shame" and "guilt," and warned Nochumson to make "positive factual statements" rather than characterizing the program "in the worst possible light."[34] Later, Graf reemphasized his dissatisfaction with Nochumson's complaints about the RAEM program by drawing a frowning face to illustrate his attitude toward Nochumson's proposal to tell the EPA that the program had "major deficiencies" and failed to produce accurate data.

In addition, there is also some direct evidence of a causal connection between Nochumson's protected activities and the adverse actions against him. For instance, Puckett's own file memoranda concerning his June 7, 1991 meeting with Nochumson expressly states that Nochumson's whistleblower complaint had prompted Puckett to criticize Nochumson for taking such a step.

In sum, therefore, Nochumson has met all four requirements for establishing a prima facie case. Consequently, the Laboratory is obliged to come forward with evidence to rebut the presumption that the adverse actions against Nochumson were taken in retaliation for activities protected under the Clean Air Act.

B. The Laboratory's Evidence of Lawful Motives

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[34] The Laboratory's post-hearing brief sets forth a lengthy portion of Graf's hearing testimony in which Graf asserts that this so-called "shame and guilt" memo was intended only to help Nochumson "see the benefits of the [RAEM] program and to help him begin to enjoy working in the program once again...." Tr. at 659. Graf also asserted that his directive to make "positive factual statements" meant only that Nochumson should make "clear, well-defined, definitive" statements. Tr. at 696. Given the context in which this memo was written, I don't find either of these assertions to be credible.

In its attempt to establish that the adverse actions were prompted by lawful rather than unlawful motives, the Laboratory relies on essentially three kinds of evidence.

First, the Laboratory relies on evidence that shows that both before and after Nochumson became the RAEM manager, the Laboratory's management had repeatedly acknowledged that its RAEM program was not in compliance with Subpart H. In particular, the Laboratory points out that Nochumson was told at the time he was hired as RAEM manager that the RAEM program was not in compliance with the EPA regulations. Similarly, the Laboratory emphasizes that this non-compliance was brought to the DOE's attention as early as July of 1990 and that its non-compliance with Subpart H was also freely disclosed in a series of public reports concerning the Laboratory's environmental and safety programs. In addition, the Laboratory notes that a proposed letter to the EPA was drafted in February of 1991 and sent to the DOE a month later. In this regard, the Laboratory also relies on evidence which indicates that while Nochumson was the RAEM manager, the Laboratory's management was in fact making an effort to come into compliance with Subpart H and had requested funding for such compliance from the DOE. All this evidence, the Laboratory argues, demonstrates that it had no secrets that it was trying to prevent Nochumson from disclosing and that there was no substantive disagreement with Nochumson's efforts to bring the RAEM program into compliance with Subpart H.

Second, the Laboratory relies on evidence that is alleged to demonstrate that the various adverse actions taken against Nochumson were in fact prompted by Nochumson's undiplomatic communications style and psychological problems. For example, the Laboratory points to evidence that shows that even after being told by his supervisors not to include gratuitous remarks in his written reports, Nochumson persisted in making such remarks, e.g., comments critical of the alleged failure of HSE-8 to honor a commitment to have Radian Corporation do a survey of sources of radioactive air emissions. Likewise, Graf's testimony indicates that Nochumson in effect refused to perform what Graf described as a "simple experiment." There is also evidence that Nochumson occasionally included sarcastic remarks in his written memoranda. For example, on one occasion Nochumson wrote that the lack of funding for RAEM program improvements "appears to reflect the priority given to this program." The Laboratory also emphasizes that two of Nochumson's prior supervisors had criticized Nochumson for such behavior in their formal evaluations of his performance. See RX 36 at 1, RX 78 at 4. In addition, the Laboratory points out that during the entire period that Nochumson was the RAEM manager, he was under severe stress that was related to his wife's terminal cancer. This stress, the Laboratory argues, created anxieties and other psychological problems that became so intense that by February of 1991 Nochumson had begun to entertain various paranoid thoughts, such as fears that he was being followed or in danger of a physical attack.

Third, the Laboratory contends that the adverse actions against Nochumson were also justified by his failure to properly perform his assigned duties. In particular, Graf testified that Nochumson was deficient in performing his job because he had failed to prepare emissions reports in a timely manner, neglected to produce stack-by-stack cost estimates for achieving compliance with Subpart H, and attempted to get other Laboratory workers to do work that he should have done himself.

In view of the foregoing evidence, I find that the Laboratory has made a showing that is sufficient to meet its burden of producing evidence of lawful motives for the adverse actions. See St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993). Accordingly, it is necessary to weigh all of the relevant evidence in order to determine if the adverse actions were in fact in violation of the Clear Air Act.

C. Conclusions Concerning the Motives for the Adverse Actions Against Nochumson

At this stage of the analysis, Nochumson can prevail if the preponderance of the evidence shows either that the reasons given by the Laboratory for the adverse actions against him were a mere pretext or that his protected activities were the more likely reason for the adverse actions. Alternatively, Nochumson can prevail if he can show that his protected activities were at least one of the motivating factors in the adverse actions and the Laboratory thereafter fails to show by a preponderance of the evidence that it would have taken the same actions even in the absence of the protected activities. In short, in such a "dual motives" case, the employer bears the risk that the influence of the legal and illegal motives cannot be separated. Pogue v. U.S. Department of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991).

After considering all of the relevant evidence, I conclude that although the adverse actions against Nochumson were motivated in part by the legitimate reasons, they were primarily motivated by Nochumson's protected activities (i.e., his internal complaints, his unauthorized contact with the EPA, and his whistleblower complaint) and would not have occurred in the absence of those activities. There are four principal reasons for this conclusion.

First, as already explained, there is a substantial amount of circumstantial and direct evidence indicating that all of the adverse actions against Nochumson were at least partially inspired by his protected activities. This evidence includes various written and oral statements that were made by Andrews, Graf, and Puckett as well as the inferences of causation that can be drawn from the close temporal relationships between the protected activities and the various adverse actions. Indeed, the circumstantial evidence of a causal relationship between

Nochumson's protected activities and the decision to not allow him to continue in his job as the RAEM manager after the program was to be transferred to another section is particularly strong.

Second, the evidence does not convincingly support the Laboratory's contention that there were no material disputes between the Laboratory's management and Nochumson concerning matters that are within the scope of the Clean Air Act. Rather, the evidence shows that even though the Laboratory was willing to freely admit that it was not in full compliance with the requirements of Subpart H, it still had substantial disagreements with Nochumson on a series of important issues.

Most importantly, there was a disagreement concerning the manner in which the non-compliance should be characterized. In Nochumson's view, the system's various failures to comply with the regulatory requirements were so extensive that they amounted to "major deficiencies" and thereby created "large uncertainties" concerning the reliability of the data produced. In contrast, Graf and Andrews believed that the existing system was basically reliable even if it was not in full compliance with all of the technical requirements of Subpart H and that the data produced was therefore essentially accurate.

In addition, there was a related disagreement concerning the safety implications of the non-compliance with Subpart H. On one hand, the Laboratory's management felt that the Laboratory's system of ambient air monitoring provided adequate assurances that the Laboratory's emissions were within the 10 millirem standard, even if its stack monitoring system did not accurately measure the emissions from each individual stack. On the other hand, Nochumson felt that the ambient air monitoring system had limitations and that therefore the deficiencies in the stack monitoring system created a risk that the Laboratory would unknowingly exceed the 10 millirem standard, thereby potentially endangering the health of Los Alamos area residents.

There was also a major disagreement between the Laboratory's management and Nochumson about what priority should be given to achieving compliance with Subpart H. On one hand, the Laboratory's senior management assigned the problem a relatively low priority and in effect delegated to the DOE all responsibility for notifying the EPA and for obtaining the funds necessary to achieve compliance.[35] Indeed, Graf indicated that, in his opinion, the non-

[35] The relatively low priority assigned to the problem is illustrated by the fact that Subpart H had been in effect for almost an entire year before the Laboratory sent the DOE a draft EPA notification concerning its non-compliance, a delay that suggests that the Laboratory's management was in no hurry to have the EPA take any formal action that would in effect force the DOE

compliance with Subpart H was only "cause for further study." CX 68. Nochumson, on the other hand, felt that achieving compliance with Subpart H deserved a high priority and that there was an obligation to notify the EPA about the program's non-compliance as soon as possible. In fact, Nochumson eventually bypassed the Laboratory's internal chain of command as well as the DOE by directly telling the EPA's David Shapiro about the problems he perceived in the Laboratory's RAEM program. This difference in priorities apparently stemmed from different perceptions about the possible legal penalties for failing to comply with the requirements of Subpart H. It was Nochumson's perception, for example, that he might even be held criminally liable as a result of the Laboratory's non-compliance. Tr. at 367-72. The Laboratory's management, however, apparently assumed that it was effectively excused from compliance by the apparent incompatibility between prompt compliance with Subpart H and the DOE's budget cycle.

Third, the record shows that the foregoing disputes were over matters that were of great importance to the Laboratory's management and therefore provided a strong motive for retaliation against Nochumson. Most significantly, Nochumson's contention that the deficiencies in the Laboratory's RAEM system presented a potential safety hazard directly contradicted the Laboratory management's contemporaneous public assurances that the Laboratory's radioactive emissions were well monitored.[36] Nochumson's internal complaints thereby created a danger that the

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to provide the funds necessary to achieve full compliance. It is of course recognized in this regard that in July of 1990 the Laboratory did inform the DOE that it was not in compliance with the stack monitoring requirements. This action, however, should not in any way be equated with sending a non-compliance notification to the EPA. Although the DOE and the EPA are both agencies of the Federal government, these agencies are clearly in an adversarial relationship insofar as there is any question about a DOE facility's compliance with the regulations governing radioactive air emissions, and thus disclosure of non-compliance to the DOE is hardly the same as giving such notice to the EPA. Indeed, the DOE has a disincentive to bring environmental violations to the EPA's attention, particularly when the costs of compliance are so large that they might mean the loss of funding for other DOE programs. It is not suprising, therefore, that in this case the DOE waited until the last possible moment before formally notifying the EPA about the Laboratory's compliance problems.

[36] For example, in 1991, the Laboratory's Deputy Director told reporters that "the level of any emissions from the Laboratory that could injure anyone's health is carefully monitored and well known." Tr. at 53.

credibility of the Laboratory's management on this issue could be undermined at a time when the local media (especially the Santa Fe New Mexican), various citizens' groups, and the DOE's "Tiger Team" were either scrutinizing or openly criticizing the Laboratory's safety practices.[37] In this regard, it should also be noted that Nochumson's long tenure at the Laboratory and his expertise in air emissions gave him a degree of credibility that none of the Laboratory's external critics were likely to have.

Nochumson's complaints were also likely to have angered the Laboratory's management because the complaints, if accepted as valid, would have required the prompt expenditure of a large amount of money that was not readily available. Indeed, the record shows that at the same time Nochumson was pressing his complaints, the Laboratory's budget for environmental protection had just undergone substantial cuts. Although the Laboratory did ask the DOE to provide additional funds for the RAEM program, the DOE refused to provide those funds. In turn, this refusal put the Laboratory's management in a very awkward position: it had to either confront the DOE in some manner (e.g., by directly reporting the RAEM program's non-compliance to the EPA) and thereby irritate the entity upon which it is most heavily dependent, or minimize the fact that its RAEM program was not in compliance with Subpart H.

Fourth, the evidence indicates that the Laboratory has failed to meet its burden of showing that the adverse actions against Nochumson would have been taken even if he had not engaged in protected activities. In this regard, the Laboratory has contended in essence that there were at least two legitimate sources of dissatisfaction with Nochumson that justified the adverse actions: Nochumson's alleged personality problems and Nochumson's alleged failure to fulfill all the responsibilities of his job. However, careful review of the evidence suggests that neither of these alleged deficiencies would have resulted in adverse actions against Nochumson if he had not engaged in protected activities.

With regard to Nochumson's personality, it has been alleged that he exhibited an abrasiveness and general state of anxiety that significantly interfered with his job performance. It is clear that to a certain extent some problems of this nature did in fact exist. For example, Nochumson's sarcastic comments, his somewhat undiplomatic way of complaining about HSE-8's alleged violation of the agreement concerning the air emissions survey, and his refusal to make changes in memos when requested by Andrews are all types of unprotected conduct that were of legitimate concern to the Laboratory's management. Likewise, Nochumson's supervisors had

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[37] See, e.g., the testimony of Tyler Mercier. Tr. at 514-30. Mercier describes himself as "a very vocal and widely publicized critic of inadequacies in the Laboratory's monitoring system." Tr. at 527.

justifiable grounds for dissatisfaction with Nochumson's resistance to conducting the "simple experiment" proposed by Graf.[38] However, the Laboratory has greatly exaggerated the extent of such personality problems, especially in its post-hearing brief. For example, the Laboratory's brief suggests that Nochumson's personality was so deficient that he had consulted "psychiatrists over a span of years" and asserts that "paranoia seriously clouded" his judgment. Brief at 14, 23. In fact, both of these assertions are somewhat misleading.

The record shows, for instance, that prior to seeking treatment from Dr. Ross in 1991, Nochumson's only contact with a psychiatrist was primarily for the purpose of marriage counselling and that all but a handful of the visits to the psychiatrist (Dr. Grace Young) were made by Nochumson's wife, not Nochumson. See RX 149, Tr. at 392. While there is some evidence that Nochumson also consulted with two psychologists (Dr. Ellen Fox and Dr. Linda Dutcher), this evidence doesn't provide much additional support for the idea that Nochumson had a serious personality problem.[39] Dr. Fox, for example, was seen for only one or two years in the early 1980's and solely for marriage counselling. Tr. at 391. Dr. Dutcher was not seen until the fall of 1990 and much of the counselling that she provided concerned problems associated with the fatal illness of Nochumson's wife. In short, although Nochumson may lack some social skills, the evidence does not show that he is a person with a serious or longstanding mental problem.

There is, in contrast, some merit to the Laboratory's contention that as a result of the stresses associated with his wife's cancer and other factors Nochumson developed some paranoid beliefs during the period he worked as the RAEM manager. In fact, at the hearing Nochumson freely admitted that during February and March of 1991 he suspected that agents of the Laboratory might be following him, tapping his phone, or intercepting his mail.[40] He

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[38] It is noted, however, that although Nochumson was slow to agree to participate in the dual advocacy mediation process, he was told by Andrews that participation was voluntary and therefore should not necessarily be faulted for his two-week delay in agreeing to participate.

[39] It should also be noted that the Laboratory's brief misidentifies both Dr. Fox and Dr. Dutcher as psychiatrists, when in fact they are both psychologists. See Tr. at 320, 391.

[40] The Laboratory's post-hearing brief implies that Nochumson had suspicions of being followed as early as October of 1990. However, Nochumson's testimony suggests that although he had noticed something unusual in October of 1990, he didn't at that time think that he was being followed, and did not in fact become suspicious about the incident until a later date. Tr. at 403.

has also acknowledged that during this same time period he feared for his physical safety.[41] While it is theoretically true that suspicions of this nature could interfere with an employee's job performance, in this case the Laboratory has failed to show that Nochumson's suspicions did in fact interfere in his work in any substantial way. There is, for example, no evidence that Nochumson ever confronted any of his supervisors with such suspicions or failed to perform any particular assignments as the result of some irrational fear. Rather, it appears that Nochumson kept his fears to himself and that the Laboratory did not in fact learn of Nochumson's suspicions until it obtained access to his medical records during pre-trial discovery. Indeed, it appears that in terms of actual on-the-job behavior Nochumson did nothing more unconventional than complain about the lack of compliance with Subpart H and distribute two allegedly confrontational memos. As previously noted, one of these memos asserted that the leader of HSE-8 had reneged on an agreement concerning an air emissions survey and the other inquired about delays in processing a contract with Southern Research Institute. CX 155, RX 99. While the broad distribution that was given to these memos may not have been entirely consistent with Laboratory protocol, the memos themselves certainly don't reflect a serious mental problem.[42] Rather, the texts of these memos are quite clear and rational. Moreover, the memos concerned important matters that could have arguably justified their broad distribution.

The evidence does, of course, show that Nochumson's supervisors were dissatisfied with his conduct during the spring of 1991. However, this evidence hardly establishes that the dissatisfaction was solely due to Nochumson's alleged paranoia or personality problems. In fact, it is clear that the primary source of this dissatisfaction was Nochumson's continued objection to the Laboratory's failure to do more to comply with the requirements of Subpart H. This is shown by the fact that when Nochumson's supervisors expressed their dissatisfaction with him, their complaints were most frequently made in direct response to Nochumson's protected activities rather than in response to some sort of unprotected activity. For example, the dissatisfaction with Nochumson's protected activities is reflected in the verbal criticism that Nochumson received in response to his suggested

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[41] It is noted, however, that at no time did either Dr. Dutcher or Dr. Ross diagnose Nochumson as suffering from paranoia. See Tr. at 325-35 (testimony of Dr. Dutcher), Tr. at 296-304 (testimony of Dr. Ross). In fact, Dr. Ross specifically ruled out such a diagnosis. Tr. at 302.

[42] It is also worth noting that the Laboratory has not disputed Nochumson's allegation that the leader of HSE-8 reneged on his commitment to have Radian Corporation do a survey of sources of radioactive air emissions.

language for the draft EPA notification letter, in the text of the handwritten memo Graf sent to Nochumson on March 15, 1991, in Graf's depiction of a frowning face when describing Nochumson's characterization of the RAEM program's deficiencies, and in most of the alleged "performance problems" that Andrews described to the Human Relations Division. In contrast, relatively little of the remaining criticism that Nochumson received from his supervisors in 1991 focused on specific incidents of legitimately objectionable unprotected conduct, such as Nochumson's refusal to delete extraneous comments from his memos or perform the "simple experiment" proposed by Graf.

It is of course recognized in this regard that much of the criticism that Nochumson received from his supervisors during the relevant time period did not focus on any specific instances of alleged misconduct but instead just generally characterized Nochumson's overall "communications style" as offensive and inappropriate. The Laboratory argues that these generalized criticisms were not prompted by the substance of Nochumson's statements, but instead by "the way" in which he expressed himself, i.e., by his alleged personality problems. This argument is not convincing. While Nochumson did in fact occasionally express his thoughts in blunt and possibly undiplomatic ways, his style of communication cannot fairly be described as unusually offensive. For example, he did not utilize obscenities or engage in name calling. Indeed, Nochumson's communications style did not appear to be any more direct or outspoken than some of the statements made to Nochumson by his superiors. It should also be noted that even though the Laboratory has alleged that Nochumson repeatedly offended other Laboratory employees while working as the RAEM manager, its specific examples of such offensive conduct are very limited. Indeed, there is little more to substantiate this assertion than the memo that he wrote about HSE-8's failure to honor its agreement and the memo inquiring about the delay in issuing the Southern Research Institute contract. Finally, the assertion that the dissatisfaction with Nochumson stemmed more from his style than from the substance of his ideas has be discounted because virtually every conceivable example of an allegedly objectionable communication consists of a document in which Nochumson expressed opinions about the RAEM program that differed from those advocated by his superiors. This is particularly true of the memo concerning the agreement with HSE-8 and the memo concerning the Southern Research Institute contract. Such evidence suggests that any alleged "personality" problem was for the most part reducible "to the problem of the inconvenience [the complainant] caused by his pattern of complaints." Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F.2d 474, 481 (3rd Cir. 1993).

The second alleged legitimate basis for the adverse actions against Nochumson is the contention that Nochumson failed to adequately perform his job responsibilities. There is far less

support in the record for this contention than for the contentions about Nochumson's other alleged problems. Indeed, the proof of Nochumson's alleged performance problems seems to relate almost entirely to the allegations that Nochumson failed to prepare emissions reports in a timely manner and neglected his responsibility to produce stack-by-stack estimates of the costs of complying with Subpart H.[43] There are at least two reasons for finding these alleged justifications for the adverse actions to be unpersuasive and a mere pretext.

First, the many contemporaneous written records of Nochumson's contacts with his supervisors (which include, inter alia, Nochumson's voluminous work diaries) contain almost nothing about these alleged problems. In fact, the Laboratory has cited only three specific documentary references to Nochumson's responsibility for preparing emissions reports, and of these three brief references, only one could reasonably be interpreted as a criticism of his performance. See RX 39, RX 150 at 70, RX 153 at 61. See also Tr. at 677 (testimony of Graf), Tr. at 776-77, 794-98 (testimony of Andrews), Tr. at 924-25 (testimony of Nochumson). Likewise, there are only three specific documentary references to Nochumson's responsibility for preparing stack-by-stack cost estimates. See RX 150 at 78-79, RX 153 at 89-90, RX 121 at 2. These references hardly substantiate the Laboratory's contention that Nochumson was given "repeated instructions" to prepare stack-by-stack cost estimates. Moreover, nothing in the list of alleged "performance problems" that Andrews recited to the Human Resources Division suggests that there was any problem with Nochumson's work product. Rather, the list of problems focused on other alleged problems, all of which directly or indirectly related to Nochumson's complaints about the RAEM program's non-compliance with the requirements of Subpart H. In short, the evidence indicates that Andrews and Graf were far more concerned about Nochumson's criticisms of the RAEM program than they were about Nochumson's lack of work on the emissions reports or his failure to produce stack-by-stack cost estimates.

The second reason for rejecting the Laboratory's allegations about Nochumson's alleged performance deficiencies is the fact that the totality of the record, including the many documents Nochumson generated while he was the RAEM manager and Nochumson's prior performance evaluations, suggests that Nochumson was in fact a conscientious employee who was doing his best under trying circumstances to fulfill the responsibilities of his job. Indeed, Nochumson credibly testified that it would have been impossible for him to have prepared stack-by-stack cost estimates because such estimates would have required expenditures of over $1 million and

[43] It has also been alleged that Nochumson attempted to get other employees to do his work. However, the Laboratory failed to produce any direct substantiation for this assertion.

necessitated "a lot" of staff support. Tr. at 439. Likewise, it appears from Nochumson's testimony that any delays in the preparation of emissions reports were attributable to work on higher priority assignments and to the general understaffing of the RAEM program. Tr. at 892-97.

In sum, therefore, I find that the adverse actions against Nochumson were primarily motivated by Nochumson's protected activities and would not have occurred in the absence of these protected activities. These adverse actions were therefore in violation of the Clean Air Act.

D. Remedies

In the event that an employer is found to have violated the whistleblower provisions of the Clean Air Act, the Secretary of Labor is empowered to order appropriate remedies, including job reinstatement and the payment of damages. 42 U.S.C. §7622(b)(2)(B). In this case, Nochumson seeks an offer of reinstatement to his former position, restitution for various financial losses, and compensatory damages for emotional distress. He also seeks an order requiring the Laboratory to expunge negative comments from his personnel records and to give him a positive performance appraisal for the period that he was the RAEM manager. In addition, he wants the Laboratory to be required to (1) publicly post a notice of the relief granted in this case, (2) notify all witnesses that it would be illegal to retaliate against them for testifying in connection with this proceeding, and (3) cease using its Employee Assistance Program as a tool for retaliating against whistleblowers. Finally, Nochumson asks that the Laboratory be required to pay his costs and attorney's fees.

1. Entitlement to Reinstatement

If the Laboratory had removed Nochumson as the RAEM manager over his objections, it is clear that he would have been entitled to be reinstated into that job. However, the evidence shows that although Nochumson had been told that the RAEM program would be reassigned to another section into which he could not transfer, that reassignment never occurred, and that ultimately Nochumson did not stop working on the RAEM program until after he told his supervisors that he no longer wished to work on the program. Accordingly, Nochumson is entitled to reinstatement into his former job only if, as he in effect alleges, he was "constructively discharged" as the RAEM manager.

The Tenth Circuit has held that a constructive discharge occurs when an "employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986). The court in Derr also held that an employer's intent is irrelevant in

determining whether such a constructive discharge has occurred. Id. In considering cases involving allegations that a complainant was constructively discharged, the Secretary has noted that a single instance of discriminatory conduct is not sufficient by itself to prove a constructive discharge but that a constructive discharge can be found when there are "aggravating factors" such as a pattern of discriminatory treatment. Johnson v. Old Dominion Security, Case No. 86-CAA-3, Final Decision and Order, May 29, 1991. Thus, for example, in Johnson the Secretary noted that a constructive discharge could be found when there was evidence that an employee had

> endured a pattern of abuse by his immediate supervisor, the supervisor repeatedly had refused to provide him with guaranteed job training, the confrontations and threats of imminent discharge adversely affected the employee's health, and the top management had manifested insensitivity and a marked lack of response to the employee's grievances and requests for assistance.

(citing Taylor v. Hampton Recreation and Hampton Manpower Services, Case No. 82-CETA-198, Decision and Order, April 24, 1987).

The facts in this case are similar to those that were found sufficient in Taylor to warrant a finding of constructive discharge. In particular, the evidence shows that Nochumson was subjected to a series of adverse actions, including threats to abolish his job, and that top management was largely unresponsive, if not hostile, toward his grievances. In addition, the record shows that the Laboratory's management attempted to remove Nochumson from his job by structuring a proposed reorganization so that Nochumson would no longer be able to work on the RAEM program. The adverse effects of these actions on Nochumson's ability to do his job is also demonstrated by Nochumson's testimony. For instance, Nochumson credibly testified that he had resigned from the job of RAEM manager because he was under so much stress that he "couldn't take it any more," an assertion that is corroborated by the statements Nochumson made to Stafford on July 11, 1991. Accordingly, I find that Nochumson was constructively discharged from his job as the RAEM manager and is therefore entitled to be reinstated in the RAEM manager's job, if he so elects. See NLRB v.Jackson Farmers, Inc., 457 F.2d 516, 518 (10th Cir. 1972).

2. Damages

It is well established that if a complainant has been injured as a result of a violation of the Clean Air Act's whistleblower provisions, the complainant is entitled to recover lost wages and benefits in addition to compensatory damages for any emotional distress and anxiety. DeFord v. Secretary of Labor, 700 F.2d 281, 286-87 (6th Cir. 1983); Blackburn v. Martin, 982 F.2d 125, 131-33 (4th Cir. 1992); Johnson v. Old Dominion Security, Case No. 86-

CAA-3, Final Decision and Order, May 29, 1991. In this regard, a complainant has the burden of proving the magnitude of the injuries and must also show that the injuries were the "proximate result" of the employer's unlawful action. Pogue v. U.S. Department of the Navy, Case No. 87-ERA-21, Final Decision and Order on Remand, April 14, 1994. See also Morgan v. Secretary of Housing and Urban Development, 985 F.2d 1451, 1459 (10th Cir. 1993). However, uncertainties concerning the amounts that an employee would have earned but for the illegal conduct should be resolved against the discriminating party. Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd., Case No. 91-ERA-13, Decision and Order, Oct. 26, 1992. In addition, the Secretary may award pre-judgment interest on awards for back pay and benefits based on the interest rates set forth in 26 U.S.C. §6621. See Wells v. Kansas Gas & Electric Company, Case No. 83-ERA-13, Decision and Order, June 14, 1984, aff'd on other grounds sub nom. Kansas Gas & Electric v. Brock, 780 F.2d 1505 (10th Cir. 1985). The Secretary, however, has refused to award pre-judgment interest on compensatory damages. Blackburn v. Metric Constructors, Inc, Case No 86-ERA-4, Decision and Order on Damages, Oct. 30, 1991 (slip op. at n. 10), reversed on other grounds sub nom. Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992).

The damages claimed by Nochumson fall into four basic categories. First, Nochumson seeks compensation for wage increases that he alleges he would have received had it not been for the unlawful adverse actions against him. Second, Nochumson seeks monetary compensation for the wages and benefits that he lost during part of the period he was off work in 1991 and 1992 due to a psychiatric disability. Third, he seeks $7500 for past and future medical expenses beyond those covered by insurance. Finally, Nochumson seeks an award of $250,000 for the emotional distress that resulted from the adverse actions.

With regard to his first claim, Nochumson contended during his hearing testimony that he has lost "about $3,000" per year in salary increases since the beginning of Fiscal Year 1992. Tr. at 185. He determined this figure by comparing the salary increases he received in Fiscal Year 1992 and Fiscal Year 1993 with information in the Laboratory's library about the salary increases given to his "peers." Tr. at 182-85. In his post-hearing brief, however, Nochumson, without any explanation, changed his basis for calculating his lost wages and argued that he should instead be awarded the difference between his present salary and the salary of the current RAEM manager. It does appear from the overall record that since 1992 Nochumson's salary has increased less than it would have if he had not engaged in protected conduct. For example, Nochumson's whistleblower complaint prevented him from being given a performance evaluation for the time that he was the RAEM manager and this lack of a current evaluation apparently limited his wage increases in subsequent years. As well, it is clear that Nochumson's complaint generated management hostility that could

well have had an adverse effect on his wage increases. In fact, both of these possibilities seem particularly likely in view of Nochumson's testimony about the differences between his recent wage increases and those of his "peers."

The Laboratory has failed to provide any evidence that contradicts Nochumson's claim for this type of damages. Likewise, the Laboratory has not disputed either of Nochumson's proposed methods for calculating such damages. Thus, an award of damages could be based on either method of calculation. However, of the two alternative methods, it seems that the first is preferable. While the second method has a superficial appeal, it appears from Nochumson's own testimony that the salary now being paid to the Laboratory's current RAEM manager would not necessarily be representative of the salary that Nochumson would be receiving if he had remained in that job. This is because, as Nochumson testified, salaries at the Laboratory are based on numerous factors including education, years of experience, and job performance. Tr. at 182-83. Since there is no evidence in the record to suggest that the current RAEM manager's education, experience, or performance is comparable to Nochumson's, it would therefore be inappropriate to use that person's current salary as a measure of damages. Accordingly, I conclude that Nochumson is entitled to back wages of $3,000 per year from the date that the Laboratory's Fiscal Year 1992 wage increases went into effect.

Nochumson's second claim for damages (i.e., the request for reimbursement for some of the wages and benefits that he lost during the period he was off work due to a psychiatric disability) is premised on the contention that the stress associated with his work problems greatly extended the amount of time that he was psychiatrically disabled after his wife's death. In particular, Nochumson appears to contend that if it had not been for the stresses associated with the adverse actions against him, he would have been off work a total of only three months as a result of his wife's illness and death. See Tr. at 185. The amount claimed in this regard is composed of four subcomponents: (1) 576 hours of lost sick leave, which he values at $18,490; (2) 317 hours of vacation time, which he values at $10,176; (3) 408 days of creditable time for purposes of computing retirement benefits, which he values at $30,094; and (4) and $31,000 in income that was lost during a period when he received disability benefits that were 30 percent less than his regular salary. Tr. at 185-87, 918-20.

To support his contention that there is a causal connection between the unlawful adverse actions and the alleged increase in the amount of time that he was off work in 1991 and 1992, Nochumson has offered his own testimony and that of the psychiatrist who treated him during this period. In particular, Nochumson testified that because of the adverse actions, his job, which had previously been something that he "drew strength from," became "a real horrible situation" that greatly aggravated the mental stresses

associated with his wife's terminal illness and eventual death. Tr. at 181-82. As previously noted, this testimony was corroborated in part by Dr. Ross, who testified that Nochumson's concerns about the repercussions of his protected activities contributed to an "adjustment reaction" that eventually evolved into a "major depression" that was treated with an antidepressant. Tr. at 294-99. Dr. Ross also described Nochumson as at times being "really frightened and quite anxious" by these repercussions. Tr. at 299. The Laboratory did not directly dispute this testimony, but did elicit Dr. Ross' admission that he could not separate the effects of the stress associated with Nochumson's work from the various other stresses in his life, such as the death of his wife, his marital difficulties, or his concerns about the welfare of his children. Tr. at 316-17.

I find that the testimony of Nochumson and Dr. Ross on this issue is fully credible and therefore conclude that a causal connection has been established between the unlawful adverse actions and the duration of the period of time that Nochumson was off work after the death of his wife.[44] Nochumson is therefore entitled to recover damages for the financial losses he suffered as a result of the additional time that he was off work. Obviously, it is impossible to precisely calculate how much of the lost work time is attributable to the illegal adverse actions and therefore any award of damages will have to be based on some kind of estimate. In this regard, the only estimate in the record is Nochumson's testimony that he believes that all but three months of his lost work time is attributable to the adverse actions. I find this testimony to be both reasonable and credible and therefore accept Nochumson's calculation of number of weeks of missed work that can be attributed to the Laboratory's unlawful acts. I therefore find that the Laboratory should pay Nochumson $18,490 for the lost sick leave, $10,176 for the lost vacation time, and $31,000 for the difference between his disability benefits and his regular salary.

However, I cannot accept Nochumson's calculation of the value of lost retirement benefits. In this regard, Nochumson has simply offered the figure of $30,094 without providing any explanation of

[44] It is noted in this regard that an award of damages is not precluded merely because other factors may have simultaneously contributed to a complainant's losses. See, e.g., DeFord v. Tennessee Valley Authority, Case No. 81-ERA-1, Order on Remand, April 30, 1984 (holding that damages could be awarded for a violation that caused complications to a complainant's pre-existing heart condition); McCuistion v. Tennessee Valley Authority, Case No. 89-ERA-6, Decision and Order, November 13, 1991 (holding that damages could be awarded for an aggravation of pre-existing hypertension).

how the figure was calculated or any description of any of the assumptions underlying the calculation. Given the fact that Nochumson's actual retirement benefits will in all probability be determined by a variety of unpredictable factors, such as his age at retirement, his final pre-retirement salary, his eventual life span, and the total number of years that he works for the Laboratory, I find Nochumson's calculation to be too speculative to warrant a cash award. Rather, I conclude that it would be more just and accurate to simply require the Laboratory to give Nochumson retirement credit for all periods between October of 1991 and the present which have not already been credited to him.

The third category of alleged damages is for the cost of medical care, primarily psychiatric and psychological counselling, that was not covered by Nochumson's insurance. Nochumson estimates that these costs will total about $7500, assuming one or two additional years of therapy. Tr. at 187. The Laboratory has not provided any evidence to rebut this estimate. Accordingly, in the absence of any countervailing evidence, I conclude that Nochumson should be awarded $7500 for past and future medical expenses.

The final category of damages sought by Nochumson consists of compensatory damages for emotional distress and anxiety. As previously explained, the law clearly allows such damages to be awarded to the extent warranted by the facts. As with other types of damages, a complainant has the burden of proving the existence and magnitude of subjective injuries as well as the burden of proving that any such injuries were the proximate result of the respondent's unlawful action. Pogue v. U.S. Department of the Navy, Case No. 87-ERA-21, Final Decision and Order on Remand, April 14, 1994. See also Carey v. Piphus, 435 U.S. 247, 263-64 n. 20. Such proof can be accomplished by showing the nature and circumstances of the wrong and its effect on the plaintiff. Id. A complainant, however, need not prove actual financial losses in order to establish entitlement to damages for emotional distress. Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). In determining how much to award in compensatory damages for emotional distress, the Secretary has attempted to ensure that comparable injuries result in comparable awards. See, e.g., McCuistion v. Tennessee Valley Authority, Case No. 89-ERA-6, Decision and Order, Nov. 13, 1991; Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd, Case No. 91-ERA-13, Decision and Order, Oct. 26, 1992.

In this case, it is clear that Nochumson suffered emotional distress and anxiety as a result of the Laboratory's adverse actions against him. This emotional distress and anxiety is documented in the testimony of Dr. Ross and Dr. Dutcher as well as in Nochumson's own testimony. It is also illustrated by the fact that during the spring of 1991 Nochumson began to suspect that was being followed and that someone might be intercepting his mail and telephone calls. Likewise, the evidence is convincing that the period of time that he was off work after his wife's death was

extended due to job-related anxieties. There is even some evidence that Nochumson's anxieties may have had some minor physical manifestations. Tr. at 295-96. Accordingly, I find that Nochumson is entitled to an award of compensatory damages for emotional distress and anxiety.

As previously noted, in awarding damages for emotional distress the Secretary attempts to ensure that comparable amounts are awarded for comparable injuries. A review of the cases in which compensatory damages have been awarded for emotional distress indicates that in recent years many of the awards for such injuries have been at or below $10,000. See, e.g., Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd., Case No. 91-ERA-13, Decision and Order, Oct. 26, 1992 ($10,000); McCuistion v. Tennessee Valley Authority, Case No. 89-ERA-6, Decision and Order, Nov. 13, 1991 ($10,000); DeFord v. Tennessee Valley Authority, 81-ERA-1, Order on Remand, April 30, 1984 ($10,000); Johnson, et al. v. Old Dominion Security, Case No. 86-CAA-3, 4 & 5, Final Decision and Order, May 29, 1991 ($2,500 for each complainant); Blackburn v. Metric Constructors, Inc., Case No. 86-ERA-4, Final Order on Compensatory Damages, Aug. 16, 1993 ($5,000). There are apparently no reported Department of Labor decisions in which the amounts awarded for emotional distress have exceeded $10,000.

The evidence in the three cases in which the Secretary awarded $10,000 for emotional distress is in many ways similar to the evidence in this case. For example, in the DeFord case the stress resulting from the complainant's transfer to a less desirable job caused the complainant to suffer anxiety and depression that was so prolonged that he was still being treated by a psychiatrist at the time of his hearing. As well, his stress resulted in complications of a pre-existing heart problem, difficulty in swallowing, nausea and indigestion. In Lederhaus the complainant was harassed by bill collectors, isolated from family members, and so depressed and angry that he contemplated suicide. Similarly, in McCuistion the complainant suffered from exhaustion, depression, and anxiety, as well as from an exacerbation of a pre-existing heart condition.

It can be argued, of course, that Nochumson's emotional distress was worse than that suffered by the complainants in the other cases and that therefore a $10,000 award would be inadequate. This argument, however, is not convincing. Although Nochumson was off work for an extended period, he received disability benefits during that period and therefore did not suffer the financial anxieties of the unemployed complainants in Lederhaus or McCuistion. Nor is there any convincing evidence that Nochumson suffered a loss of his personal reputation, as was shown in DeFord. Likewise, although Nochumson's emotional distress did have some minor physical manifestations, he did not suffer physical manifestations that were as serious as those described in the DeFord and McCuistion decisions. Moreover, it must also be

recognized that much of Nochumson's emotional distress and associated psychiatric disability is attributable to his wife's death and would have therefore occurred even in the absence of any unlawful actions by the Laboratory. In short, the degree of job-related emotional distress in this case is less than rather greater than the emotional distress that existed in the other cases. Accordingly, it might appear that an award of $10,000 in this case would be excessive in comparison with the awards granted in the other cases. However, consideration must also be given to the fact that the $10,000 awarded to the complainants in the Deford, McCuistion and Lederhaus decisions would be worth substantially more today if adjusted for inflation. It must also be recognized that in 1989 the Tenth Circuit held that compensatory damages in a similar emotional distress case could be as much as $50,000 before becoming unlawfully disproportionate with awards in comparable cases. Wulf v. City of Wichita, 883 F.2d 842, 874-75 (10th Cir. 1989)(reversing an award of $250,000 and remanding with instructions to reduce the award to an amount no greater than $50,000). Given these various considerations, I conclude that the sum of $10,000 would be sufficient to adequately compensate Nochumson for his emotional distress.

3. Other Forms of Proposed Relief

As previously explained, Nochumson has also requested various other forms of relief, including an order requiring the Laboratory to provide him with a favorable performance rating and to expunge negative statements about him from its personnel files. These requests are justifiable and therefore will be granted. Nochumson's other proposed forms of relief, however, seem unnecessary. In particular, there has been no convincing reason given for requiring the Laboratory to publicly post a notice of the relief granted in this case or to notify witnesses that it is illegal to retaliate against them for testifying in this matter. Similarly, there is no plausible reason for ordering the Laboratory not to use its Employee Assistance Program as a tool for illegal retaliation against whistleblowers. Indeed, as previously noted, the Secretary has recently held that a mere referral of an employee to such a program is not in itself a type of adverse action.

4. Costs and Attorney's Fees

Under the provisions of the Clean Air Act a successful complainant is also entitled to recover reasonable costs and attorney's fees. However, under the provisions of 29 C.F.R. §24.6 (b)(3) such expenses are not recoverable unless and until a final order is issued in the complainant's favor. Accordingly, the resolution of any dispute over costs or attorney's fees will be deferred until after the Secretary issues a final order.

RECOMMENDED ORDER

Respondent Los Alamos National Laboratory is ordered to:

1. Reinstate David Nochumson into his former position as manager of the Laboratory's RAEM program, if he elects such reinstatement.

2. Pay David Nochumson back wages at the rate of $3,000 per year from the date that Fiscal Year 1992 wage increases went into effect and factor such increases into his wage base for all future wage increases.

3. Pay David Nochumson $18,490 for lost sick leave, $10,176 for lost vacation time, and $31,000 for the difference between his disability benefits and his regular salary.

4. Give David Nochumson retirement credit for all periods since October of 1991 which have not already been credited to him.

5. Pay David Nochumson $7500 for past and future medical expenses.

6. Pay David Nochumson compensatory damages in the amount of $10,000 as compensation for emotional distress.

7. Pay pre-judgment interest on the amounts set forth in paragraphs 2, 3, and 5 in accordance with the rates adopted under 29 C.F.R. §20.58(a).

8. Cease and desist from any further unlawful acts of discrimination against David Nochumson, provide him with a favorable performance evaluation for the period he worked as the RAEM manager, and expunge all negative statements about his performance during that period from the Laboratory's personnel records.

_____
Paul A. Mapes
Administrative Law Judge

Date:
San Francisco, California

NOTICE: This Recommended Decision and Order and the related administrative file is herewith being forwarded to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has

responsibility for advising and assisting the Secretary of Labor in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).